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COURT OF APPEALS

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COURT OF APPEALS CASES

PEOPLE v SEALS

Docket Nos. 282215 and 282216. Submitted April 14, 2009, at Grand Rapids. Decided July 14, 2009, at 9:00 a.m.

A jury in the Kent Circuit Court, Mark A. Trusock, J., convicted Nicholas J. Seals and Lewis A. Seals of felony murder. Both defendants appealed, and their appeals were consolidated.

The Court of Appeals *held*:

1. A prosecutor may, in certain instances, offer evidence that an exculpatory statement is false as circumstantial evidence of guilt. The trial court properly allowed the prosecution an opportunity to establish the falsity of exculpatory statements Nicholas Seals made in his prior sworn testimony pursuant to an investigative subpoena from the prosecution.

2. The Fifth Amendment privilege against compelled self-incrimination can be asserted in any proceeding and protects against any disclosures that a witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used, i.e., other evidence that would furnish a link in the chain of evidence needed to prosecute a claimant of the privilege. The introduction at trial of Nicholas Seals's testimony pursuant to the investigative subpoena was not violative of his Fifth Amendment privilege. The testimony was not coerced or self-incriminating, nor did it provide a link in the chain of evidence necessary for his prosecution.

3. Nicholas Seals's exculpatory testimony pursuant to the investigative subpoena was not evidence of other crimes, wrongs, or acts, which would be inadmissible under MRE 404(b). His testimony pursuant to the investigative subpoena was properly introduced at trial. MRE 404(b) was not violated to the extent that such testimony led to testimony by a police officer regarding police contact with Nicholas Seals when he had a gun and illicit drugs on his person. MRE 404(b) allows the admission of "other bad acts" evidence to show proof of motive, opportunity, or intent. Police testimony that Nicholas Seals had previously bought or used drugs and handled guns could be used to demonstrate motive and opportunity with respect to the home invasion, larceny, and murder that led to the prosecution of the defendants in this case.

4. The expiration of the statutory period of limitations applicable to the predicate felonies of home invasion and larceny does not bar Nicholas Seals's prosecution and conviction for felony murder. The felony-murder statute, MCL 750.316(b), requires only proof that the murder occurred during the commission of the underlying felony. There is no additional requirement that the defendant be charged and convicted of the underlying felony.

5. Nicholas Seals was not denied the effective assistance of counsel at trial. His claim of ineffective assistance of counsel is based on counsel's failure to object to the felony-murder charge and to the admission of his testimony pursuant to the investigative subpoena. Because counsel for Lewis Seals had objected to the admission of the investigative-subpoena testimony on behalf of both defendants, counsel for Nicholas Seals did not need to raise the same objection. With respect to the failure to object to the felony-murder charge on the basis of the expiration of the statutory period of limitations for the underlying felony, there was no binding authority for such an objection at the time of trial. Counsel cannot be deemed ineffective for failing to raise an objection because he lacked a basis for it and because the statute-of-limitations issue has now been resolved unfavorably to Nicholas Seals.

6. A remand of Nicholas Seals's case is necessary so that the judgment of sentence can be corrected to reflect sentence credit for the time he spent incarcerated between his arrest and sentencing.

7. Lewis A. Seals was not denied the effective assistance of counsel at trial on the asserted ground that counsel failed to call witnesses who could establish an alibi. Counsel could not call such witnesses because the requirements of MCL 768.20(1) regarding notice of an alibi defense had not been fulfilled. Nothing in the lower court record suggests that the witnesses could have provided Lewis Seals with an alibi. Furthermore, the failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy. In any event, there was sufficient other evidence of Lewis Seals's guilt.

8. The prosecutor at trial did not improperly vouch for, or bolster the testimony of, police officers when she stated in her opening statement that the officers in the cold-case team "do their jobs" and "don't rush to judgment." In making those assertions, the prosecutor merely indicated that the police did not merely rely on a convicted felon's statements against the defendants, but undertook further investigation. The prosecutor, in stating that neither she nor the police would benefit from bringing a case

unless they were sure they had the perpetrator, made an improper comment. However, a new trial is not warranted because the comment was not outcome-determinative in light of the strong evidence against Lewis Seals.

Affirmed; remanded for correction of Nicholas Seals's judgment of sentence.

HOMICIDE — FELONY MURDER — UNDERLYING FELONIES — STATUTES OF LIMITATIONS.

The felony-murder statute requires only proof that the murder occurred during the commission of the underlying felony; the defendant need not be charged and convicted for the underlying felony in order to be convicted of felony murder; the expiration of the statutory period of limitations for the underlying felony does not bar prosecution and conviction for felony murder (MCL 750.316[b]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *Kimberly M. Manns*, Assistant Prosecuting Attorney, for the people.

P. E. Bennett for Nicholas J. Seals.

Neil J. Leithauser for Lewis A. Seals.

Before: WILDER, P.J., and METER and SERVITTO, JJ.

PER CURIAM. In these consolidated appeals, defendants appeal as of right their jury trial convictions of felony murder, MCL 750.316(b). We remand Docket No. 282215 to the trial court for the purpose of correcting defendant Nicholas Seals's judgment of sentence, but affirm both cases in all other respects.

Defendants were charged in connection with the 1996 shooting death of George Powell. In November 1996, defendants, along with another individual, broke into the home Mr. Powell shared with his roommate, Marlon Jackson, believing that no one was present in

the home. Defendants and their accomplice apparently intended to steal whatever drugs and money they could find. When it was discovered that Mr. Powell was at home, defendant Lewis Seals shot and killed him.

DOCKET NO. 282215

On appeal, defendant Nicholas Seals first contends that the prosecution's use of his alleged involuntary investigative subpoena testimony, to impeach his credibility, violated his right against compelled self-incrimination and his rights to due process. We disagree.

Defense counsel objected to the admission of the investigative subpoena testimony on the basis that it was inadmissible as other "bad acts" under MRE 404(b). However, there was no objection to the admission of the evidence based on the constitutional issue now raised. Because this constitutional issue was not preserved, we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

To avoid forfeiture of a nonpreserved constitutional error under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights. *Id.* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*. Even if a defendant satisfies these three requirements, reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 764-767. We review a trial court's decision to admit evidence for abuse of

discretion; however, we review de novo a preliminary question of law involved in that decision. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Here, Detective Erik Boillat testified that he questioned Nicholas J. Seals twice, under oath, pursuant to an investigative subpoena in October 2006. According to Boillat, Nicholas Seals denied any knowledge of the murder, denied any connection with drugs at the time of the murder, and denied any connection with guns. Detective Boillat also testified about contacts with defendant both before and after the murder, including one where Nicholas Seals was found to be in possession of marijuana and one where he had accidentally shot himself. The recorded investigative subpoena testimony was played for the jury at trial. Defendant first asserts that use of the investigative subpoena testimony to impeach him, when he did not testify at trial, was improper. We disagree.

A prosecutor may, in certain instances, offer evidence that an exculpatory statement is false as circumstantial evidence of guilt. *People v Dandron*, 70 Mich App 439, 442; 245 NW2d 782 (1976). Substantive use of "proved-to-be false exculpatory statements" is not a novel idea in this state:

> Defendant has no claim to be protected against the exposure of this falsehood where he indulges in it for his own exculpation. He runs the risk of this exposure when he invents a false defense.
>
> * * *
>
> . . . Thus, it may be shown that he made false statements for the purpose of misleading or warding off suspicion; though these are by no means conclusive of guilt, they may strengthen the inferences arising from other facts. [*People v Arnold*, 43 Mich 303, 304-305; 5 NW 385 (1880).]

"[T]he *Dandron* [*supra*] holding is even more applicable to prior false testimony than to false statements made to police." *People v Wackerle*, 156 Mich App 717, 721; 402 NW2d 81 (1986). "If a prosecutor may use a defendant's 'proved-to-be false exculpatory statements' as evidence of guilt, then it follows that the prosecutor must be afforded the opportunity to establish the falsity of defendant's statements." *Id*. at 722.

While the majority of cases discussing the use of a defendant's prior statements concern statements provided to the police or at another trial, in this case defendant was under oath, was advised that he could have counsel present, and was advised of his Fifth Amendment privilege before he provided statements in an effort to exculpate himself. He was afforded essentially the same protections as defendants in the relevant caselaw. Because defendant elected to make an alleged exculpatory statement to the police, the prosecutor had to be afforded the opportunity to establish the falsity of his statements. *Wackerle*, *supra.*

Defendant also asserts that his testimony pursuant to the investigative subpoena was involuntary and that its use against him for any purpose violated his right against compelled self-incrimination. We disagree.

It is well established that a defendant's testimony in a former unrelated proceeding is admissible as substantive evidence, absent an indication that the prior testimony was given under compulsion. *People v Ewing*, 99 Mich App 110, 114; 297 NW2d 628 (1980). This result is consistent with the evidentiary rule that statements or admissions by an accused, either before or after the commission of a crime or before or after his arrest, are admissible if they are voluntary. *People v Plato*, 114 Mich App 126, 134-135; 318 NW2d 486 (1981).

MCL 767A.5 provides, in part:

(1) A person properly served with an investigative subpoena under this chapter shall appear before the prosecuting attorney and answer questions concerning the felony being investigated or produce any records, documents, or physical evidence he or she is required to produce.

(2) The prosecuting attorney may administer oaths and affirmations in the manner prescribed by law to implement this chapter.

(3) Any person may have legal counsel present in the room in which the inquiry is held. The person may discuss fully with his or her legal counsel any matter relating to the person's part in the inquiry without being subject to citation for contempt.

(4) The prosecuting attorney may require a person having knowledge of any records, documents, or physical evidence subpoenaed under this chapter to testify under oath or acknowledgment with respect to those records, documents, or physical evidence.

(5) The prosecuting attorney shall inform the person of his or her constitutional rights regarding compulsory self-incrimination before asking any questions under an investigative subpoena. This subsection does not apply if the person is granted immunity under section 7.

(6) If a criminal charge is filed by the prosecuting attorney based upon information obtained pursuant to this chapter, upon the defendant's motion made not later than 21 days after the defendant is arraigned on the charge, the trial judge shall direct the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she is charged and may direct the prosecuting attorney to furnish to the defendant the testimony any witness who will testify at the trial gave the prosecuting attorney pursuant to this chapter regarding that crime except those portions that are irrelevant or immaterial, or that are excluded for other good cause shown.

There is no argument that defendant, before providing testimony pursuant to the subpoena, was not in-

formed that he may have counsel present or informed of his constitutional rights regarding compelled self-incrimination. While defendant contends that his testimony was forced and involuntary, there were options available to him if he did not want to provide testimony. MCL 767A.6 provides, in part:

> (1) If a person files an objection to, or fails or refuses to answer any question or to produce any record, document, or physical evidence set forth in an investigative subpoena, the prosecuting attorney may file a motion with the judge who authorized the prosecuting attorney to issue the subpoena for an order compelling the person to comply with that subpoena. The prosecuting attorney shall serve notice of the motion under applicable court rules.
>
> (2) If the prosecuting attorney files a motion with the court for an order under subsection (1), the court shall hold a hearing on the motion. The person has the right to appear and be heard regarding the motion and to have legal counsel present.
>
> (3) If the court determines the question or evidentiary request of the prosecuting attorney is appropriate and within the scope of the authorization, the court shall order the person to answer the question or to produce the record, document, or physical evidence.
>
> (4) If the court determines the question or request is inappropriate or outside the scope of the authorization, the court may order the prosecuting attorney to modify the question or the request or may disallow the question or the request.
>
> (5) The court shall not compel the person to answer a question or produce any record, document, or physical evidence if answering that question or producing that record, document, or physical evidence would violate a statutory privilege or a constitutional right.

The fact that defendant did not take advantage of his opportunity to have the trial court determine whether

he was required to respond to the investigative subpoena does not make his testimony forced.

With respect to the Fifth Amendment, the privilege against compelled self-incrimination can be asserted in any proceeding and it protects against any disclosures that a witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used (i.e., that which would furnish a link in the chain of evidence needed to prosecute the claimant of the privilege). *Hoffman v United States*, 341 US 479, 486; 71 S Ct 814; 95 L Ed 1118 (1951); *United States v Hubbell*, 530 US 27, 38; 120 S Ct 2037; 147 L Ed 2d 24 (2000). As pointed out by defendant, immunity from use and derivative use of compelled testimony is coextensive with the scope of the privilege against self-incrimination:

> The [Fifth Amendment] privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. [*Kastigar v United States*, 406 US 441, 453; 92 S Ct 1653; 32 L Ed 2d 212 (1972).]

As indicated above, however, defendant's testimony was not "forced." Second, defendant denied any knowledge of or participation in the murder, any handling of guns, and any involvement with drugs. Defendant's testimony, then, was not incriminating. Nor did it lead to the disclosure of incriminating evidence. Detective Boillat testified about contact he had with defendant

that involved guns and drugs around the time of the murder. At the time of defendant's testimony, the police had already spoken to two witnesses, including defendant's accomplice in the murder, Harold Hayes, and both disclosed that defendant was involved in the murder. By the time the police had taken testimony from defendant, they already had significant evidence against him and his testimony provided no link in the chain of evidence necessary to prosecute him. Given all these, defendant has failed to demonstrate that his investigative subpoena testimony led to the infliction of "penalties affixed to criminal acts" and thus violated his Fifth Amendment privilege.

Likewise, while defendant is correct that involuntary confessions (which are of questionable trustworthiness) are not a proper foundation for impeachment (See *People v Reed*, 393 Mich 342, 355-356; 224 NW2d 867 [1975]), because defendant did not confess or incriminate himself in any way, his reliance on cases involving involuntary confessions is misplaced.

In any event, in light of the other evidence presented, including accomplice testimony placing defendant at the murder scene with a gun in his hand, and police testimony concerning contacts with defendant involving guns and drugs, any error in the admission of the testimony would have been harmless. Defendant's investigative subpoena testimony was inconsequential to the ultimate resolution of the case.

Defendant next argues that improper evidence of his character was admitted, through his investigative subpoena testimony, in violation of MRE 404(b). We review a trial court's decision to admit evidence for abuse of discretion. *McDaniel*, *supra*.

MRE 404(b)(1) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the

character of a person in order to show action in conformity therewith." The admission of defendant's investigative subpoena testimony does not constitute an admission of other "bad acts" evidence. Because his testimony was exculpatory, what was admitted was defendant's *denial* of engaging in other bad acts. The application of MRE 404(b) to defendant's testimony is questionable.

The admission of defendant's testimony did lead to testimony by the police of other contacts with defendant when he had a gun and had drugs on his person. To the extent defendant is objecting to the admission of this testimony, we disagree that it violated MRE 404(b).

As previously indicated, the prosecutor used defendant's testimony to establish that he lied to the police about whether he used drugs or handled guns thus reflecting a consciousness of guilt according to the prosecution. It does not appear that the evidence refuting his denials was offered to show action in conformity therewith. Evidence of other acts may be admitted to show proof of motive, opportunity, or intent. MRE 404(b). The prosecutor's theory of the case was essentially that defendant and his accomplices went to the home of a known drug dealer, believing him to be gone, with the intent of stealing whatever drugs and money the dealer had at the home. That defendant had previously bought or used drugs and had previously handled guns could be used to demonstrate motive and opportunity.

Defendant next asserts that his conviction of first-degree felony murder must be vacated and that a conviction for second-degree murder must be entered because the statute of limitations applicable to the felony or felonies serving as the basis for the first-degree felony-murder conviction have expired. We disagree.

Under MCL 750.316:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind . . . .

The elements of first-degree (felony) murder are

> (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316 . . . . [*People v Hutner*, 209 Mich App 280, 282-283; 530 NW2d 174 (1995).]

An indictment for murder may be brought at any time. MCL 767.24(1). Indictments for second-degree home invasion and larceny (or their attempt), however, must be brought within six years. MCL 767.24(5).

As noted by defendant, the murder (and its underlying felonies) occurred in 1996 and defendant was not charged with first-degree murder until 2007. Clearly the statutory period of limitations in which to charge defendant with either larceny or second-degree home invasion had expired at the time charges were brought. Although couched in terms of a due process violation (of which there is none; defendant having not been charged with or convicted of either of the above felonies), defendant's actual arguments appear to be that (1)

conviction for felony murder requires an actual conviction of the underlying felony, and (2) a statutory bar to prosecution of the underlying felony also bars a felony-murder conviction. Defendant, however, cites no authority for his apparent propositions, and we have found no binding authority that squarely addresses his concerns. Defendant's statute of limitations argument appears to present a question of first impression in Michigan.[1]

Other jurisdictions have addressed the very issue presented to this Court and have found that the expiration of the statutory period of limitations for a predicate felony does not serve as a bar to a conviction for first-degree felony murder. We find their analyses sound.

Georgia has a first-degree felony murder statute similar to Michigan's. Under Ga Code Ann §16-5-1(c), the offense of murder can be committed either with malice aforethought or while "in the commission of a felony" and there is no applicable statute of limitations for the offense of murder. *Wooten v State*, 262 Ga 876, 880; 426 SE2d 852 (1993). In *State v Jones*, 274 Ga 287; 553 SE2d 612 (2001), the defendant was charged with felony murder, malice murder, conspiracy to commit robbery, aggravated battery, and concealing the death of another. The conspiracy and aggravated battery served

[1] In *People v Gibson*, 115 Mich App 622, 627; 321 NW2d 749 (1982), a panel of this Court stated, "In this case, there can be no conviction of the greater crime, felony murder, without conviction of the lesser crime, assault with intent to commit armed robbery. Therefore, the dual convictions violate double jeopardy considerations. [*People v Wilder*, 411 Mich 328; 308 NW2d 112(1982)]." However, this case is not binding, because of its publication date, and the statement was made in the context of a double jeopardy argument, as the defendant had actually been charged with and convicted of the underlying felony of assault with intent to commit armed robbery. That is not the factual situation before this Court.

as the predicate felonies for purposes of the first-degree murder charge. The alleged crimes occurred 14 years before the indictment. The defendant filed a demurrer and plea in bar on the basis of the expiration of the statutory period of limitations, and the trial court sustained the demurrer and plea in bar with respect to every count except malice murder, stating that the statutory period of limitations for prosecution for the felonies of conspiracy to commit robbery and aggravated battery had expired and that, because the state could not prosecute the felony, it could not prosecute the felony murder.

The Georgia Court of Appeals reversed. It noted that "[f]oreign jurisdictions which have considered the issue before us have uniformly held that 'the running of the statute of limitations on the underlying felony is irrelevant to a prosecution for felony murder.' " *Id*. The Georgia court opined that accepting defendant's argument would effectively impose a time limit on every felony-murder case, in direct contravention of legislative intent.

The *Jones* court also noted that other jurisdictions, in addressing this issue, rely on the wording of their felony-murder statutes, which, like Georgia's, do " 'not require that the defendant be charged and convicted of the underlying felony. The jury must simply find that the defendant committed or attempted to commit it.' " *Id*. at 288 (citations omitted). The *Jones* court stated:

> Contrary to the trial court's analysis, a felony murder conviction is not dependent upon the successful prosecution of the underlying felony. "The mere preclusion of the state's capacity to prosecute the subordinate crime because of a time limitation has no effect upon the question of whether such crime was committed." "The crime of murder is independent of the underlying felony. Therefore, the underlying felony need not be charged as a separate

> substantive offense, and the fact that it is time-barred does not preclude a prosecution for felony murder." . . . We therefore conclude that the expiration of the limitations period for the underlying felony does not preclude a prosecution for felony murder. [*Id*. (citations omitted).]

Illinois courts have reached the same conclusion, noting that "proof that the underlying felony occurred is not used to establish that felony *per se*; rather, it is used to establish the requisite substitute criminal intent for felony murder." *People v Wilson*, 348 Ill App 3d 360, 364; 283 Ill Dec 881; 808 NE2d 1169 (2004). In *People v Holt*, 91 Ill 2d 480, 485; 64 Ill Dec 550; 440 NE2d 102 (1982), the Illinois Supreme Court, discussed the significance of the underlying felony:

> [T]he felony in felony murder is essential in the sense that if there were no felony the defendant could not do anything in the course of it, but the felony is only a precondition, not an element of independent significance. The real element of felony murder is not so much the felony itself as the special status a felon has from moment to moment while committing the felony.

According to both *Wilson* and *Holt* a conviction on the underlying felony is not an element of felony murder, and the statute of limitations applicable to the underlying felony is irrelevant to the charge and conviction of felony murder.

Other states have likewise held that the expiration of the statutory period of limitations on an underlying felony does not preclude a finding of guilt for first-degree felony murder. For example, see *State v Dennison*, 115 Wash 2d 609, 625-626; 801 P2d 193 (1990) (holding that a conviction on the underlying felony is not a jurisdictional prerequisite to prosecution for felony murder); *State v Lacy*, 187 Ariz 340, 350; 929 P2d 1288 (1996) ("Even if the statute of limitations has

expired on the predicate offense, a defendant may still be prosecuted for felony murder."); *Jackson v State*, 513 So 2d 1093, 1095 (Fla App, 1987) (conviction of the underlying felony is not a jurisdictional prerequisite to prosecution for felony murder); *State v White*, 239 Neb 554; 477 NW2d 24 (1991) (a defendant need not be charged and convicted of an underlying felony in order to be convicted of first-degree murder); *Commonwealth v Munchinski*, 401 Pa Super 300; 585 A2d 471 (1990) (Whether or not the statute of limitations has run on the underlying felony is immaterial, so long as the essential elements of second-degree murder are proven beyond a reasonable doubt.).

We adopt the holdings of the other jurisdictions. Michigan's felony-murder statute requires only proof that the murder occurred during the commission of a specified felony. There is no additional requirement that the defendant be *charged and convicted of* the underlying felony. We are required to read and apply unambiguous statutes as written. *Gebhardt v O'Rourke*, 444 Mich 535, 541-542; 510 NW2d 900 (1994). If we were to adopt defendant's position, we would effectively impose a time limit on every felony-murder case, in direct contravention of legislative intent.

Additionally, the crime of murder is independent of the underlying felony. It is true that at the time this case was tried, double jeopardy prevented a defendant from being convicted of both felony murder and the underlying felony. See *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). In *People v Ream*, 481 Mich 223, 225-226; 750 NW2d 536 (2008), however, the Supreme Court overruled *Wilder* and held that dual convictions for both felony murder and the underlying felony do not violate double jeopardy protections. The decision in *Ream* reinforces that felony murder and the

underlying felony are separate offenses. The state's inability to prosecute the predicate crime because of a time limitation has no effect on the question whether the predicate crime was actually committed.

Defendant next contends that he was denied the effective assistance of counsel. The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo. *Id.* However, where, as here, there was no evidentiary hearing on the matter below, our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant's claim of ineffective assistance of counsel rests on counsel's failure to object to the admission of defendant's investigative subpoena testimony and to counsel's failure to object to the charge of first-degree felony murder, for the reasons already addressed. With respect to the admission of the investigative subpoena

testimony, at a pretrial motion, counsel for defendant's codefendant indicated that using the testimony against *either* defendant was an improper attempt to impeach a prior sworn statement by extrinsic evidence. Even though defendant's counsel did not make this objection, an argument was made on behalf of defendant concerning use of the testimony. Because his codefendant's counsel had made the argument on behalf of both defendants, it would have been redundant for defendant's counsel to make the argument. With each counsel being present at the hearing, there was an implicit joinder by defense counsel in the argument made by counsel for codefendant. Counsel was not ineffective for failing to parrot codefendant's counsel.

In considering defendant's argument that counsel was ineffective for failing to object to the first-degree murder charge having been brought on a predicate felony whose limitations period had expired, we would note that at the time of trial there was no binding authority to support defendant's argument. With this Court's resolution of the issue contrary to defendant's position and the fact that there was no prior established caselaw on which to base an objection, counsel cannot be said to have been ineffective for failing to object.

Finally, defendant Nicholas Seals contends he is entitled to a correction of his jail credit. We agree.

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

A defendant is entitled to credit for time served before sentencing pursuant to the above statute even if

the defendant is sentenced to serve a mandatory term of life imprisonment without parole. *People v Dittis*, 157 Mich App 38, 42; 403 NW2d 94 (1987).

In the instant matter, the record reflects that this defendant was arrested on January 10, 2007, and remained incarcerated, without bond, until his sentencing on November 13, 2007. The trial judge did state, at the time of sentencing, that defendant was entitled to 307 days of jail credit on his sentence. The judgment of sentence, however, only indicates that defendant was sentenced to life imprisonment without the possibility of parole and gave him no credit for the jail time he had served between his arrest and sentencing. As conceded by the prosecution, the discrepancy between the trial court's statement at sentencing and the sentence reflected on the judgment of sentence appears to be a clerical error.

We remand Docket No. 282215 to the trial court for the purpose of correcting the judgment of sentence, consistent with the above. We affirm in all other respects. We do not retain jurisdiction.

DOCKET NO. 282216

On appeal, defendant Lewis Seals first contends that he was denied the effective assistance of counsel. We disagree.

As previously indicated, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Odom*, 276 Mich App at 415. Where, as here, there has been no evidentiary hearing on the issue

below (defendant's motion to remand was denied by this Court), our review is limited to errors apparent on the record. *Rodriguez*, 251 Mich App at 38.

Defendant asserts that counsel was ineffective for failing to call any witnesses on his behalf. He attaches affidavits of witnesses (admittedly not a part of the formal record) that would provide an alibi. For example, an affidavit from Yvonda Seals, defendant's sister, states that she and defendant visited family from November 3, 1996, to November 14 or 15, 1996, in Bay City, Michigan. Yvonda swears that she advised defense counsel of this fact and offered to provide him with one of the pictures taken while defendant was with her in Bay City.

MCL 768.20(1) provides:

> If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense.

If the defendant fails to file and serve the above written notice, the trial court is required to exclude evidence offered by the defendant for the purpose of establishing an alibi. MCL 768.21. Because defense counsel did not file the requisite notice of alibi with respect to any of defendant's proposed witnesses, defense counsel was precluded from calling them to testify.

There is nothing in the lower court record to suggest that the witnesses could have provided defendant with an alibi. Although defendant attaches to his appellate brief the affidavits of his sister, children's mother, and

another male relative, the affidavits are not a part of the lower court record and, therefore, cannot be considered. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Given that there was no evidentiary hearing on the matter and nothing in the record concerning what the witnesses' testimony might have been, there are no mistakes apparent on the record with respect to counsel's failure to call defendant's proposed alibi witnesses. Moreover, the failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

One might conclude that the absence of a record regarding these alleged alibi witnesses and the above statements would lead this Court to remand to permit the trial court to conduct an evidentiary hearing. However, even if we were to conclude that counsel's performance fell below an objective standard of reasonableness, there was significant eyewitness testimony at trial from an accomplice with respect to defendant's involvement in the murder, as well as testimony from an undercover officer concerning a conversation between this defendant and his codefendant about the alleged lack of evidence in the case. Given this testimony, we cannot say there is a reasonable probability that, but for counsel's errors, the result would have been different.

Defendant next contends that the prosecutor engaged in misconduct by improperly vouching for, or bolstering the testimony of, law enforcement officers, thus depriving defendant of a fair trial. We disagree.

Defendant did not object to any of the instances of alleged misconduct at trial and did not preserve his issues for appeal. *People v Schutte*, 240 Mich App 713,

720; 613 NW2d 370 (2000). Therefore, our review is for outcome-determinative, plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Under the plain error rule, reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 764-767.

To determine if a prosecutor's comments were improper, we evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship of these comments to the admitted evidence. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements. *Unger*, 278 Mich App at 235.

Generally, prosecutors are accorded great latitude regarding their arguments, and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness. *Id.* at 276. "[H]owever, the prosecutor may argue from the facts that a witness should be believed." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

Defendant first directs us to the prosecutor's opening statement, in which she stated (in reference to the cold case team), "[T]hey do their job. This is an old case. They don't rush to judgment." Reviewing the statement in context, we do not find that it amounted to improper vouching, nor was it an attempt to bolster the witnesses' testimony. The statement was made after the prosecutor detailed that information on this 1996 mur-

der came many years later from Kengie Gates, a inmate in federal prison. The prosecutor then detailed that Gates's information led them to Harold Hayes, who was also currently in prison on unrelated charges, and that they met with the police on several occasions, changing their stories. It was then that the prosecutor stated:

> 11-9-04, I have here Cold case test information. What they do is they don't then come in and ask for a warrant. The evidence will not be based on Kengie Gates and Harold Hayes, they come to the Prosecutor's Office and say, you know, "Give me a felony murder warrant for these guys." No, they do their job. This is an old case. They don't rush to judgments. They want to see if these people are being truthful, so they go out and they do things like this.

Clearly, the prosecutor was acknowledging that some of her witnesses' testimony, particularly that of convicted felons who provided police with several different versions of the events, may appear untrustworthy. But she went on to state that the police did not base the case against defendant solely on these witnesses' statements. The prosecutor was merely indicating that the police did not simply take a convicted felon's statements against defendants to pursue the case against defendants, but conducted further investigation as well. This statement, in context, is not improper vouching but, rather, an indication of the steps the police took in investigating the case.

Defendant also asserts that the prosecutor continued to imply greater credibility on the part of the law enforcement witnesses and, by extension, Harold Hayes and Kengie Gates during her closing argument:

> Well we know Harold's lied in the past. I mean, that's why these guys don't rush to judgment. They spend two years doing continued investigation. They confront these guys and give them several opportunities to say, wait, wait,

> wait, wait. You know. What are you talking about. . . . These guys do not rush to judgment in this case. They take their time because they know what they're dealing with. And you know what you're dealing with . . . you're dealing with a guy like Harold Hayes that kick starts the investigation after Kengie Gates, right? So, am I asking you to rely on Harold Hayes for some of the evidence? I am. But you know that's not all you have. If it was, I would never be here. We would never have brought this case to you. Because there is no benefit to us, law enforcement, Prosecutor's Office, any of us, to bring a case to you if we're not sure we got the guys. . . . But how do we benefit if . . . we purposely, you know, mislead you, hide evidence, twist stuff, to conform to our little case. Who here is benefiting from that? Then we let the real guys go.

The prosecutor's comment that the police did not rush to judgment and took their time, again, simply conveys that the police did not rely exclusively on the statement of a convicted felon who had previously lied to them in requesting that charges be brought against defendants. The comment can be viewed as summarizing certain evidence at trial while downplaying a potential weakness in the prosecution's case (that one of the key witnesses was an accomplice in the crime, had lied to the police several times, was in prison for unrelated crimes, and may get a plea deal concerning the instant murder in exchange for his testimony).

The remaining comments are more troublesome. The prosecution's statement, that neither she nor the police would receive a benefit from bringing a case unless they are sure they have the right guys, appears to express her personal belief in defendants' guilt, which our Courts have held is improper. See, e.g., *People v Farrar*, 36 Mich App 294, 299; 193 NW2d 363 (1971). The comment could also be viewed as the prosecutor's emphasis on the fact that because the prosecutor's role and responsibility is to seek justice and not merely

convict (see, e.g., *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 [2007]), there would be no benefit to the prosecutor to convict an innocent person, or the comment could be viewed as a response to defense counsel's pointed attempts to discredit witnesses over previous lies about the offense. However, regardless of the prosecutor's intention, these comments do not refer to and are not based upon the evidence, but merely imply that she, the police, and the prosecution witnesses were to be believed.

While the comments were improper, a new trial is not warranted because the comments were not outcome-determinative. First, the trial court instructed the jurors that the lawyer's statements and arguments were not evidence, but were only meant to help them decide each side's legal theories. Second, there was strong, direct evidence from defendant's accomplice concerning this defendant's role as the shooter in the murder. We decline to reverse a conviction where isolated, improper remarks did not cause a miscarriage of justice. See MCL 769.26.

We affirm in all respects with regard to Docket No. 282216.

In Docket No. 282215, we remand to the trial court for the purpose of correcting the judgment of sentence consistently with this Court's directive. We affirm the conviction of defendant Nicholas Seals in all other respects, and we do not retain jurisdiction.

GREAT WOLF LODGE OF TRAVERSE CITY, LLC
v PUBLIC SERVICE COMMISSION

Docket Nos. 281398 and 281404. Submitted July 7, 2009, at Lansing. Decided July 14, 2009, at 9:05 a.m.

Great Wolf Lodge of Traverse City, LLC, bought farmland with abandoned buildings on it as a site for its resort and water park. There was no electric service to the site, but there was an unused distribution line through which Cherryland Electric Cooperative had provided electric service in the past. Great Wolf contracted with Traverse City Light & Power (TCL&P), a municipal service not subject to regulation by the Public Service Commission (PSC), for electric service to the site. When Great Wolf asked Cherryland to remove the unused line, Cherryland, as a condition for removing the line, asked Great Wolf to state in writing that Cherryland would be the provider of electricity for the resort and water park. Fearing delays in construction, Great Wolf canceled its contract with TCL&P and entered into a three-year service agreement with Cherryland. Cherryland filed an application with the PSC for implementation of the large resort service (LRS) tariff for electric service to Great Wolf. The PSC denied the application, but allowed the LRS tariff for one year or until the parties could work out the terms of a special contract. While the LRS tariff was still in effect, Cherryland unilaterally increased the rate to the large commercial and industrial rate. Great Wolf filed a complaint with the PSC, seeking a return to the LRS rate, a refund of payments in excess of that rate, and a declaration that at the end of the parties' agreement, Great Wolf can choose a different provider of electricity. The PSC ordered a refund, but declined to impose a fine or interest on the refund amount. The PSC also declined the requested declaration, determining that under Mich Admin Code, R 460.3411 Great Wolf was an existing customer that cannot transfer from one utility to another and that Cherryland, as the first utility serving Great Wolf, is entitled to serve the entire electric load on Great Wolf's premises. Both parties appealed to the Ingham Circuit Court, which affirmed the PSC's determination under Rule 411 that Great Wolf was an existing Cherryland customer that cannot seek an alternative provider of electricity, affirmed the PSC refund order, but disagreed with the PSC's

decision not to impose a fine or add interest to the refund amount. Great Wolf and the PSC each applied for leave to appeal in the Court of Appeals, which granted the applications and consolidated the appeals.

The Court of Appeals *held*:

1. Rule 411 provides that existing customers shall not transfer from one utility to another. Mich Admin Code, R 460.3102(l) defines "utility" as an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the PSC. In light of this definition of "utility," the transfer prohibition of Rule 411 applies to transfers from one utility regulated by the PSC to another similarly regulated utility. TCL&P is not subject to PSC regulation. Therefore, Rule 411 does not prevent Great Wolf's transfer to TCL&P.

2. Rule 411 defines "customer" as the buildings and facilities served, not the individual, association, partnership, or corporation served. Where service to buildings or facilities is interrupted, or buildings are demolished or facilities are removed, in direct connection with a change of ownership or land use, neither the service interruption nor the replacement of old buildings and facilities with new ones creates a new customer. However, some service interruption or elimination may end the utility-customer relationship. For example, if the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions should be deemed to have extinguished the previously existing customers on the site, thus severing the utility-customer relationship. The factual record in this case is limited, so a remand to the PSC is necessary for a full development of the record, findings, and conclusions regarding whether Great Wolf is an existing Cherryland customer that Cherryland is entitled to continue serving under Rule 411.

3. MCL 124.3(2) provides that a municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing. MCL 460.10y(2) guarantees certain rights of incumbency to municipally owned utilities and defines "customer" similarly to Rule 411 as the buildings or facilities served. The term "customer" has the same meaning under MCL 124.3(2) that it does under Rule 411. Under MCL 124.3(2), a complete change in the use of a parcel,

along with the demolition or removal of all existing buildings and facilities and their replacement with a new structure, brings about a change of customer. A remand to the PSC is required for a determination whether a customer was already receiving service, as contemplated by MCL 124.3(2), when Great Wolf acquired its property.

4. MCL 460.552 provides that no public utility supplying electricity shall put into force any rate or change for electricity without first petitioning the PSC for authority. MCL 460.558 provides that any corporation or person engaged in the business of furnishing electricity, or any officer, agent, or employee of such corporation or person who willfully or knowingly fails or neglects to obey or comply with a PSC order shall forfeit to the state of Michigan a sum not to exceed $300 for each offense. The circuit court correctly concluded that the PSC erred by failing to apply the forfeiture provisions of MCL 460.588 for Cherryland's negligence (or worse) in raising the rate charged to Great Wolf contrary to a lawful PSC order.

5. The circuit court correctly determined that the PSC erred by failing to award interest on the refund ordered. An award of interest is necessary to restore Great Wolf to its original condition.

6. The circuit court correctly decided that the PSC did not err by denying Great Wolf's motion for a rehearing on the asserted ground that additional provisions in the special contract needed to be addressed. Great Wolf failed to comply with the pleading requirements of Mich Admin Code, R 460.17505(d) with respect to the alleged additional provisions, and Great Wolf could not properly rely on its appendix to raise the additional claims.

Affirmed in part, vacated in part, and remanded to the PSC for further proceedings.

1. PUBLIC UTILITIES — ELECTRIC SERVICE — EXISTING CUSTOMERS — TRANSFERS FROM ONE UTILITY TO ANOTHER.

An administrative rule prohibiting an existing electric customer from transferring from one utility to another applies only to transfers from one utility regulated by the Public Service Commission to another similarly regulated utility (Mich Admin Code, R 460.3102[l], R 460.3411[2]).

2. PUBLIC UTILITIES — ELECTRIC SERVICE — EXISTING CUSTOMERS.

An administrative rule provides that the first electric utility serving a customer (which the rule defines as the buildings and facilities served, not the individual, association, partnership, or corporation served) is entitled to serve the entire load on the premises of the

customer, even if another utility is closer to a portion of the customer's load; where service to buildings or facilities is interrupted, or buildings are demolished or facilities removed, in direct connection with a change of ownership or land use, neither the service interruption nor the replacement of old buildings and facilities with new ones creates a new customer; however, some service interruption or elimination may end the utility-customer relationship; if, for example, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions are deemed to have extinguished the previously existing customer on the site, thus severing the utility-customer relationship (Mich Admin Code, R 460.3411[1][a], [11]).

3. PUBLIC UTILITIES — ELECTRIC SERVICE — MUNICIPALLY OWNED UTILITIES.

A municipally owned electric utility is statutorily barred from delivering electricity to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing; for purposes of the statute, "customer" means the buildings or facilities served (MCL 124.3[2], 460.10y[2]).

Clark Hill PLC (by *Roderick S. Coy* and *Leland R. Rosier*) for Great Wolf Lodge of Traverse City, LLC.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *David A. Voges*, *Michael A. Nickerson*, and *Emmanuel B. Odunlami*, Assistant Attorneys General, for the Public Service Commission.

Dykema Gossett PLLC (by *Albert Ernst* and *Daniel J. Martin*) for Cherryland Electric Cooperative.

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM. In Docket No. 281398, plaintiff, Great Wolf Lodge of Traverse City, LLC (Great Wolf), appeals by leave granted the circuit court's order affirming in part and reversing in part a decision of defendant Public Service

Commission (PSC). In particular, Great Wolf challenges the circuit court's affirmance of the PSC's decisions to (1) disallow Great Wolf from contracting for electric service from a utility other than defendant Cherryland Electric Cooperative (Cherryland), and (2) not conduct an evidentiary hearing in connection with other contract issues. In Docket No. 281404, the PSC appeals by leave granted the circuit court's order insofar as it reversed the PSC's decision not to impose a fine, or award interest, in connection with its determination that Cherryland had overcharged Great Wolf for electricity and that the latter was thus entitled to a refund. We affirm in part, vacate in part, and remand to the PSC for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

This case involves the provision of electricity to Great Wolf, a resort and water park in Traverse City, Michigan. Cherryland is an electric cooperative that is subject to regulation by the PSC and serves the Traverse City area. This case concerns whether Great Wolf must use Cherryland for electricity to its resort, or whether it is at liberty to contract with a competitor. Cherryland maintains that, because it had provided service to the property before Great Wolf acquired it, Great Wolf came to the property as an existing customer, thus entitling Cherryland to continue providing service under Mich Admin Code, R 460.3411 (Rule 411). That rule provides in pertinent part as follows:

> (1) As used in this rule:
>
> (a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation served.

* * *

> (2) Existing customers shall not transfer from one utility to another.
>
> * * *
>
> (11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load.

Great Wolf built its resort on 48 acres of what was once farmland, to which Cherryland had provided electricity. At the time Great Wolf purchased the land, some abandoned buildings remained. None had electric service, but an unused Cherryland distribution line (or service drop) remained on the property. Great Wolf solicited bids for electric service to the resort and then contracted with Traverse City Light & Power (TCL&P), a municipal provider not regulated by the PSC, for that purpose.

When construction of the resort began, Great Wolf found that it could not raze the abandoned farm buildings and begin construction until Cherryland removed its unused distribution line. Cherryland informed Great Wolf that it would remove the line if Great Wolf stated in writing that the removal was necessary for the demolition of the existing farm buildings and that Cherryland would be the electricity provider for the resort. Fearing delays in construction, Great Wolf terminated its contract with TCL&P and agreed to accept electric service from Cherryland under a special, three-year customer service agreement.

In the course of performing under that contract, Cherryland filed an application with the PSC seeking to implement the large resort service (LRS) tariff for electric service to Great Wolf. The PSC denied the request on the grounds that Great Wolf was the only customer eligible for the LRS rate and it would be

imprudent to approve a generally available LRS tariff on the basis of the incremental costs of serving a single customer. However, to preserve the status quo until the parties worked out the terms of a special contract, the PSC's order denying Cherryland's application nonetheless approved the LRS rate for one year, or until the effective date of a special contract, whichever came first.

During the period for which the LRS rate had been approved, however, Cherryland unilaterally increased the rate to its large commercial and industrial (LCI) rate. Great Wolf responded with a two-count complaint filed with the PSC. Count I sought a refund for the alleged overcharge, asked the PSC to fine Cherryland for violating its order specifying the LRS rate, and requested a return to that rate. Count II sought a declaration that at the end of the present agreement, Great Wolf would be free to choose a different electricity provider.

Cherryland moved for summary disposition on the grounds that it had switched Great Wolf to the LCI rate because Great Wolf did not meet the minimum load requirement for the LRS rate and Cherryland wished to avoid being fined for charging an unauthorized rate, and that Rule 411 precluded Great Wolf from receiving electric service from any other provider.

The PSC ruled in favor of Great Wolf on Count I, and accordingly ordered Cherryland to refund $72,550.16, but declined to impose a fine, or interest on the award, on the ground that Cherryland's interpretation of its duties, though erroneous, had not been unreasonable. The PSC refused Great Wolf's request for the option of choosing an alternative provider of electricity, declaring that Great Wolf was an existing customer of Cherryland because the previous owner of the property used Cherryland's service.

Great Wolf moved for a rehearing, arguing that additional provisions in the special contract needed to be addressed. The PSC denied the motion and declined to hold an evidentiary hearing on the ground that Great Wolf had not raised any such other issues in its complaint.

Both parties appealed to the circuit court, which agreed that Cherryland was liable for a refund of its overcharges to Great Wolf, but disagreed with the PSC's decision not to impose a fine or add interest to the refund amount. The circuit court affirmed the PSC's application of Rule 411, and thus its conclusion that Great Wolf was an existing customer of Cherryland and therefore not entitled to seek electric service elsewhere. The circuit court additionally agreed with the PSC that Great Wolf had not pleaded any other issues pertaining to the special contract for which a hearing should be held.

Great Wolf sought leave to appeal the circuit court's order affirming the PSC's decision under Rule 411. The PSC sought leave to appeal the reversal of its decision not to impose a fine against Cherryland or award interest to Great Wolf. This Court granted leave in connection with both applications, then consolidated the appeals for a decision on appeal.

II. STANDARDS OF REVIEW

A final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). " 'A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8).' " *Id.* (citation omitted).

To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the PSC's administrative expertise and should not substitute its judgment for that of the PSC. *Attorney General v Pub Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

Issues of statutory interpretation are reviewed de novo. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference. *Id.* at 108. "Principles of statutory interpretation apply to the construction of administrative rules." *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003).

III. CHOICE OF ELECTRICITY PROVIDER

A. UTILITY OR MUNICIPAL PROVIDER

The PSC and Cherryland rely on *In re Complaint of Consumers Energy Co*, 255 Mich App 496; 660 NW2d 785 (2003), in which this Court recited that, for purposes of utilities providing electricity, the "customer" is the buildings and facilities served, and held that the combination of a change of ownership and demolition of all buildings served did not create a new customer. *Id.* at 502-503, citing Rule 411.

Great Wolf attempts to distinguish *In re Complaint of Consumers Energy* on the ground that the case concerned a dispute over which of two utilities would provide electricity, while this case concerned one regu-

lated utility, Cherryland, and a municipal provider not subject to the PSC's regulation, TCL&P. *Id*. at 497. Great Wolf argues that the latter does not constitute a "utility" for purposes of the prohibition in Rule 411(2) against transferring service "from one utility to another" because Mich Admin Code, R 460.3102(l) (Rule 102[l]) defines "utility" as "an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission," thus causing TCL&P, as a municipal provider not regulated by the PSC, to fall outside that definition. See MCL 460.6(1) ("The [PSC] is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, . . . and except as otherwise restricted by law."); MCL 460.10y(11) ("[T]he commission does not have jurisdiction over a municipally owned utility."). Rule 411 does not define the term "utility."

The PSC accepted the argument that, insofar as Great Wolf was seeking to contract with TCL&P, Rule 411 is not directly applicable because that rule "does not purport to alter the rights or obligations of a non-jurisdictional utility." However, the circuit court in turn held that it "need not address what a utility is in the context of Rule 411(2) of the administrative code since subrule 11 clearly sets forth Cherryland's entitlement." We conclude that the circuit court interpreted that subrule in connection with Cherryland too generously.

Again, Rule 411(11) states: "The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load." The circuit court erred in treating this subrule as establishing an incumbent utility's

rights against competition from apparently any alternative provider, as opposed to just PSC-regulated utilities as defined.

Rule 411(11) concerns extensions of service on premises already being served, and guards against any single premises being served by multiple utilities. Rule 411(11) joins Rule 411(2) in envisioning only other *utilities*—thus, utilities as defined—as the potential competition from which an incumbent provider is entitled to protection. The announcement in Rule 411(11) of its applicability "even if another utility is closer to a portion of the customer's load" indicates that competition from "another utility" is what is being guarded against; otherwise that language would be mere surplusage. See *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439, 457; 553 NW2d 7 (1996) (stating that a construction rendering some statutory language nugatory or surplusage should be avoided). Rule 411(11) thus does not obviate the need to decide whether Rule 411(2) applies where the competing entity is a municipal service not regulated by the PSC.

"[W]here a statute or court rule provides its own definition of a term, the term must be applied in conformity with that definition." *McAuley v Gen Motors Corp*, 457 Mich 513, 524; 578 NW2d 282 (1998). Likewise, when a term is defined in an administrative rule, that definition must carry through. See *City of Romulus*. Fidelity to that fundamental principle of construction inveighs against broadening the definition of "utility" for purposes of Rule 411 to cover an entity that does not satisfy the definition of that term as set forth in Rule 102(l). Because the regulatory scheme at issue includes a detailed definition of "utility," which excludes such municipal providers as Great Wolf's choice for its own needs, TCL&P, and Rules 411(2) and 411(11)

impose limitations on only utilities as defined, neither Rule 411(2) nor Rule 411(11) prevents Great Wolf from contracting with TCL&P for its electrical needs.

However, Great Wolf does not seek a declaration that it might contract with a municipal provider for electricity, but instead requests a declaration that it is free to deal with any provider for its electrical needs. Great Wolf thus is not agreeing to constrain its choice of an alternative for Cherryland to TCL&P, but instead may wish to consider another PSC-regulated utility if given the chance to do so.[1] Accordingly, in light of Great Wolf's broad request for declaratory relief, the question whether Great Wolf came to this situation as a new customer, thus entitled to choose from any available electricity provider, must be answered.

B. PSC-REGULATED UTILITY: EXISTING CUSTOMER

Although Great Wolf has been accepting service from Cherryland, it has consistently done so under protest, citing business imperatives while asserting its prerogative to contract with another source for electricity. Neither the PSC nor Cherryland has suggested that Great Wolf's assertion of its right to choose a provider has been supplanted by its having accepted service from Cherryland as it has. For these reasons, we will review the question whether Great Wolf stepped into the shoes of an existing customer of Cherryland when it initially acquired the property and contracted with TCL&P, then agreed to a temporary arrangement with Cherryland for electricity.

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[1] The circuit court reported that Consumers Energy joined Cherryland and TCL&P as providers of electricity serving the area, and so presumably that PSC-regulated entity is a contender for Great Wolf's business if Great Wolf obtains the declaration it seeks.

In *In re Complaint of Consumers Energy*, *supra* at 502-503, this Court held that for purposes of Rule 411, a change of ownership and demolition of all buildings served did not create a new customer. Apparently influencing this Court's decision was that the new owner of the premises at issue had endeavored to time its purchases of the pertinent parcels to avoid a finding that "the discontinuation of service was directly related to the change in ownership." *Id.* at 503. This leaves open the possibility that a discontinuation of service, and demolition of buildings, coming about for reasons other than direct furtherance of a plan to change ownership or land uses, can indeed extinguish an existing customer.

The PSC and Cherryland suggest that *In re Complaint of Consumers Energy* stands for the proposition that an electric utility's customer is the *parcel of land* served, such that, once service to a parcel is established, as long as the utility keeps a live distribution line in the vicinity and stands prepared to resume service, no period of interruption in service, and no degree of destruction of the actual buildings or removal of facilities served extinguishes the utility-customer relationship. The circuit court agreed, stating that "the Court of Appeals . . . conclude[d] that the customer was the premises served by Consumers." The Court of Appeals did, in fact, state that "the . . . *property* is an existing customer" and that the new owner's "purchases of the three parcels did not give it the right to change to a new utility because the *property* had always been an existing customer of Consumers." *Id.* at 502-503 (emphasis added). Although those statements, in isolation, could be read to indicate that this Court equated the term "customer" with the parcel served, we conclude that they need not, and should not, be so interpreted.

If Rule 411(1)(a) calls for carefully distinguishing between individuals, associations, partnerships, or corporations taking service from the buildings and facilities served, with only the latter two constituting a "customer," it also demands distinguishing buildings and facilities served from the parcels served. The rule providing the definition could easily have stated that the customer was the parcel, but instead specified buildings and facilities. It follows, then, that where there are no buildings or facilities being served, there is no customer.

The statements from *In re Complaint of Consumers Energy* giving rise to the suggestion that this Court equated the terms "customer" and "parcel" came about in the context of distinguishing buildings and facilities served from the property owner taking service, and discussing the provision in Rule 411(11) for "the first utility's entitlement to serve the entire electric load." In light of that, this Court's statements referred simply to property upon which an existing customer stood, such that extensions of service upon the property should be the business of the incumbent utility. Even when viewed in isolation, the statements do not suggest that the question of equating "customer," for purposes of identifying an existing one, with the "parcel" served was raised or decided. To take the Court's references to "property" to indicate that the parcel, apart from its buildings and facilities, was itself the "customer" is to misread the statements.

Instead, we read *In re Complaint of Consumers Energy* as indicating that where service to buildings or facilities is interrupted, or buildings are demolished or facilities are removed, in direct connection with a change of ownership or land use, neither the service interruption nor the replacement of old buildings and

facilities with new ones creates a new customer. To avoid interpreting that case, or the definition of "existing customer," as locking an incumbent utility into that status for a given parcel in perpetuity if it so chooses, with no regard for periods of interruption in service or elimination of buildings and facilities, it is necessary to recognize that some such interruption or elimination would indeed work an end to the utility-customer relationship.

The question then remains whether, under these facts, there were buildings or facilities on the site in question that qualified as "existing customers" of Cherryland when Great Wolf acquired the site. If the changes in buildings and facilities and interruption of service came about in reasonable proximity to and for the purpose of a change in ownership and plan for the site, then under *In re Complaint of Consumers Energy*, those changes and that interruption did not create a new customer. If, however, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions should be deemed to have extinguished the previously existing customer or customers on the site, thus severing the utility-customer relationship.[2]

However, it does not appear that the pertinent determinations can be made from the existing record. The

[2] In the latter event, if indeed any remaining buildings still stood only because of Cherryland's refusal to honor a request to remove its distribution line, Cherryland's obstinacy should not be equated with a continuation of service to those buildings.

question of Cherryland's entitlement to continue to serve the subject site was decided below on a motion for summary disposition, thus leaving a limited factual record. We therefore vacate the PSC's holding, and the circuit court's affirmance, that Cherryland is entitled to continue serving Great Wolf; clarify that for purposes of Rule 411, "customer" means buildings and facilities, not the land on which they once stood; declare that a significant interruption of service to buildings or facilities can extinguish the existence of an existing customer in some situations; and remand this case to the PSC for full factual development, findings, and conclusions in this regard.

C. MUNICIPAL PROVIDER: CUSTOMER ALREADY RECEIVING SERVICE

As discussed earlier, and as the PSC noted, to the extent that Great Wolf envisions TCL&P as its alternative to Cherryland because it is a municipal provider not subject to PSC regulation, TCL&P does not fit the definition of "utility" for purposes of Rule 411, and so the strictures of that rule do not come to bear.

An authority that does act as a limitation on municipal providers such as TCL&P is MCL 124.3(2), which states, "A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing." The question then is not whether the site at issue constitutes an "existing customer" for purposes of Rule 411, but whether the facts of this case present a "customer[] . . . already receiving [electric] service" from Cherryland.

MCL 460.10y(2) guarantees certain rights of incumbency to municipally owned utilities. Because TCL&P

has no incumbency under the instant facts, that statue is not directly applicable. However, it includes the following provision: "For purposes of this subsection, 'customer' means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service." MCL 460.10y(2) thus adopts a definition of "customer" mirroring that of Rule 411(1)(a), but announces that this definition applies only to that subsection. We must therefore decide whether to apply the definition of "customer" as set forth in Rule 411(1)(a) and MCL 460.10y(2), which do not apply in connection with TCL&P, to MCL 124.3(2), which does.

Cherryland points out that MCL 124.3 was amended in 2000, after the promulgation of Rule 411 and the effective date of MCL 460.10y. See 2000 PA 141 and 155. "[T]he Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). That principle suggests that if the Legislature was aware of the definition of "customer" set forth in MCL 460.10y(2) when it recast MCL 124.3 in 2000, it was also aware that MCL 460.10y(2) announced no broader application of that definition than to itself.

However, that the definition set forth in MCL 460.10y(2) perfectly mirrors the one set forth in Rule 411(1)(a) indicates a legislative preference that the meaning of "customer" for purposes of Rule 411 carry over to related statutes. We accordingly treat as instructive the definition of "customer" set forth in Rule 411 and MCL 460.10y(2), and adopt it for purposes of MCL 124.3(2). Statutes that have a common purpose should be read in harmony with each other in furtherance of that purpose. *Jennings v Southwood*, 446 Mich 125,

136-137; 521 NW2d 230 (1994). The goal of harmonization is obviously better served with a uniform definition of "customer" in these related authorities.

The relevant inquiry is whether, under these facts, there were buildings or facilities on the site in question that were "already receiving" electric service from Cherryland at the time Great Wolf came to the site and sought service from TCL&P. The inquiry thus shifts from determining whether there was an "existing customer," as would be appropriate for a Rule 411 analysis, to determining whether a customer was "already receiving" service.

In re Complaint of Consumers Energy is instructive, although it concerned a situation where one PSC-regulated utility was to be replaced with another and it construed "existing customer" for purposes of Rule 411. As noted, this case involves replacing a PSC-regulated utility with a municipal one and the construction of the phrase "customer already receiving service" under MCL 124.3(2).

Great Wolf relies on a circuit court case involving facts similar to those of the instant case, including parties with an interest in the instant case's outcome, *Cherryland Electric Coop v Traverse City Light & Power*, Grand Traverse Circuit Court Case No. 01-21871-CZ (2002). In that case, Gordon Food Service purchased a parcel that had earlier been served by Cherryland, asked Cherryland to discontinue service, demolished all the existing buildings, erected a store, and contracted with TCL&P for its electricity. The circuit court held that under MCL 124.3(2), a "complete change in use" of the parcel, along with the demolition or removal of all existing buildings and facilities and their replacement with a new structure, brings about a change of customer. The court added, "Gordon Food

Service never received electric service from Cherryland merely by acquiring this property at which Cherryland was serving prior to that acquisition." The PSC and Cherryland, of course, remind this Court that it is not bound by the pronouncements of the circuit court. But the reasoning in that case remains persuasive.

The phrase "customers already receiving service" in MCL 124.3(2) describes something different than "existing customers" in Rule 411(2). "Existing customer" describes a customer with a certain status, whereas "customer already receiving service" describes a customer actively engaged in certain commerce. A customer may more logically retain the status of "existing" over an interruption in service than may a customer deemed to be "receiving service." The questions in this case then are why the interruption of service from Cherryland on the subject parcel came about, why the buildings or the facilities on the parcel were abandoned, demolished, or removed, and how long were the buildings or facilities not actually receiving service from Cherryland.

If the changes and interruption came about in reasonable proximity to, and for the purpose of, a change in ownership and plan for the site, then a choice must be made between the examples of *In re Complaint of Consumers Energy* (adopting Rule 411 analysis for present purposes), and the circuit court case of *Cherryland Electric Coop* (applying MCL 124.3). We adopt the latter example, bearing in mind that it was not supplanted by this Court's superior authority in *In re Complaint of Consumers Energy* because the two cases invoked different authorities in relation to substantially different facts.

However, at issue for purposes of application of MCL 124.3 are the same facts that need to be considered

when deciding whether there was an existing customer for purposes of Rule 411. And the same problem arises—i.e., the lack of a full evidentiary record below. The PSC's fact-finding mission on remand should include determining whether a "customer" was "already receiving service" when Great Wolf acquired the property. In making this determination, the PSC is to bear in mind that, to the extent that Great Wolf wishes to do business with TCL&P, the operative authority is MCL 124.3, not Rule 411, but that "customer" for that purpose adopts the definition set forth in Rule 411(1)(a) and MCL 460.10y(2), and that "existing customer" need not mean the same as "customer already receiving service."

IV. FINE AND INTEREST

A. FORFEITURE (FINE)

MCL 460.552 provides:

> The Michigan public utilities commission, hereinafter referred to as "the commission" shall have control and supervision of the business of transmitting and supplying electricity as mentioned in the first section of this act and no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge.

The Public Utilities Commission was subsequently abolished, and its duties transferred to the PSC.

MCL 460.558, in turn, provides:

> Every corporation, its officers, agents and employes, and all persons and firms engaged in the business of furnishing electricity as aforesaid shall obey and comply with every lawful order made by the commission under the authority of this act so long as the same shall remain in force. Any

> corporation or person engaged in such business or any officer, agent, or employe thereof, who wilfully or knowingly fails or neglects to obey or comply with such order or any provision of this act shall forfeit to the state of Michigan not to exceed the sum of 300 dollars for each offense. Every distinct violation of any such order or of this act, shall be a separate offense, and in case of a continued violation, each day shall be deemed a separate offense. An action to recover such forfeiture may be brought in any court of competent jurisdiction in this state in the name of the people of the state of Michigan, and all moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

Those two statutes operate together to establish that electric utilities must confine themselves to charging approved rates, and that violations of that duty "shall" result in penalties within the range prescribed. "The term 'shall' denotes a mandatory rather than a discretionary course of action." *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003).

Because MCL 460.558 states that a utility "who wilfully or knowingly fails or neglects to obey or comply with [a PSC] order . . . shall forfeit to the state of Michigan not to exceed the sum of [$300] for each offense," the PSC's order requiring that Cherryland refund certain unauthorized overcharges to Great Wolf without adding any forfeiture provision was unlawful if Cherryland in fact wilfully or knowingly failed or neglected to obey or otherwise comply with a PSC order.

The circuit court noted that "the Commissions' July 22, 2004 Opinion and Order specifically stated that the status quo between the parties was to be maintained for at least a year," but that, even so, "Cherryland decided to unilaterally change the ordered rate." The court further noted that the PSC itself had stated that

Cherryland should have sought clarification if it had any reservations about continuing to charge the ordered rate in light of Great Wolf's rates of consumption.

The PSC and Cherryland argue that the circuit court improperly substituted its judgment for that of the PSC by independently concluding that Cherryland's behavior in this regard was sufficiently egregious to trigger the forfeiture provision of MCL 460.558. However, the court in fact referred, and thus properly deferred, to the PSC's own determination that Cherryland should have sought clarification rather than unilaterally departing from the terms of an order still in operation. The statutory forfeiture provision does not come to bear only in response to a wilful or knowing failure to comply with a lawful PSC order; it also applies in the event of negligent noncompliance. In identifying Cherryland's proper remedy if it really had concerns about the rate it charged Great Wolf—i.e., seeking clarification—and Cherryland's failure to resort to that obvious avenue of ensuring it was performing as required, the PSC itself provided factual findings setting forth an episode of negligence at best, thus calling for imposition of a statutory fine. The PSC's decision to overlook that negligence (or worse) by not imposing a fine was thus unlawful as a violation of its statutory duty in the matter, as the circuit court declared.

For these reasons, we affirm the circuit court's determination that the PSC erred by failing to apply the forfeiture provisions of MCL 460.558.

B. INTEREST

The PSC declined to award interest on the refund it ordered Cherryland to issue to Great Wolf, apparently treating interest as some kind of penalty it thought was not deserved. The circuit court in turn cited caselaw for

the proposition that the PSC is authorized to award interest on customer refunds, and concluded that its failure to do so in this instance was error. See *Detroit Edison Co v Pub Service Comm*, 155 Mich App 461, 469; 400 NW2d 644 (1986).

Cherryland argues that the interest-free refund awarded to Great Wolf "itself shielded [Great Wolf] from paying the 'higher' appropriate rate for not meeting the LRS rate conditions." However, interest is not a penalty, but rather part of the judgment, compensating the person owed for the lost time-value of the money during the course of the dispute. See *Xerox Corp v Oakland Co*, 191 Mich App 433, 441; 478 NW2d 702 (1991). Accordingly, an award of interest on top of the nominal dollars found to have been overpaid is necessary to restore Great Wolf to its original condition. See *Detroit Edison*, *supra* at 470 ("a guarantee of a refund *with interest* protects the customers of a utility" [emphasis added]).

For these reasons, we affirm the circuit court's determination that the PSC erred by failing to include interest with the refund that Cherryland must pay Great Wolf.

V. REQUEST FOR EVIDENTIARY HEARING

In the course of denying a motion for rehearing, the PSC rejected the argument that there should be a remand for a hearing on other disputed provisions in the special contract. The PSC stated, "While [Great Wolf] did submit a redline copy of the proposed special contract that included changes unrelated to the issue of transmission and distribution services, [Great Wolf] made no mention of these additional issues in its pleading," and then concluded that Great Wolf's advocacy in this regard did not comport with the applicable pleading requirements.

The circuit court agreed, stating:

> The Court dispenses with this claim for the simple fact that certain issues were never raised in the complaint . . . [which] only referenced the disputed provision that [Great Wolf] was to continue receiving transmission and distribution services solely from Cherryland. While the Court recognizes that a so-called "red lined" copy of the special contract was attached to the complaint, no specific mention of any other disputed provision was disclosed in the body of the pleading. Nor were any additional claims averred.

Great Wolf admits that its complaint did not set forth issues beyond those concerning choice of electricity provider, and does not dispute that its prayer for relief made no mention of the sundry additional issues it wished to litigate, but argues that those additional issues were presented, and clearly indicated, by attachment of a copy of its proposed contract as marked up by Cherryland in response. But Great Wolf cites no authority for the proposition that the PSC, or a party opponent, is obliged to look for signs of matters in dispute in an appendix, and from that identify specific issues for litigation and determination.

According to the administrative rules, a formal complaint filed with the PSC must set forth "the specific allegations necessary to reasonably inform the respondent of the nature of the claims the respondent is called upon to defend, with specific reference where practicable to the section or sections of all statutes, rules, regulations, orders, and tariffs upon which the complainant relies . . . ." Mich Admin Code, R 460.17505(d). Rule 505(f) in turn demands a "clear and concise statement of the relief sought and the authority upon which the complaint relies . . . ." In light of these precise pleading requirements, Great Wolf could not expect the PSC to allow Great Wolf to select and develop issues

from the grab bag of potential issues signaled by a marked-up copy of a proposed contract.

For these reasons, we reject this claim of error.

VI. CONCLUSION

We vacate the determination that Cherryland is entitled to continue serving Great Wolf's resort and remand this case to the PSC for determination of that question anew upon development of a full factual record and as otherwise guided by this opinion.

We reiterate that, for purposes of Rule 411(1)(a), "customer" does not mean the land or premises served, but, as the rule indicates, means the buildings and facilities served, and that a significant interruption of service to buildings and facilities, which is not directly related to a change in ownership or site plan, can indeed extinguish the utility-customer relationship. We additionally clarify that Rule 411 applies to the extent that Great Wolf seeks a declaration that it is free to contract with any provider for electricity, which may include a PSC-regulated utility, but that MCL 124.3(2) applies to the extent that Great Wolf seeks to contract with a municipal provider of that service. Further, "customer" for purposes of the latter rule means the buildings and facilities served, by extension of the definition in Rule 411(1)(a) and MCL 460.10y(2).

In all other regards, we affirm the circuit court, including its determination that Cherryland should be assessed a fine and required to pay interest on the refund to Great Wolf.

Affirmed in part, vacated in part, and remanded to the PSC for further proceedings consistent with this opinion. We do not retain jurisdiction.

LEE v DETROIT MEDICAL CENTER

Docket No. 282268. Submitted March 10, 2009, at Detroit. Decided July 14, 2009, at 9:10 a.m.

Adriana Lee, as the personal representative of the estate of Rufus Young, Jr., deceased, brought an action in the Wayne Circuit Court against the Detroit Medical Center, Children's Hospital, Drs. Ahm Mahbobul Huq, Jayshree Rao, and Vince Truong, and others, alleging that the defendants breached their statutory duty under MCL 722.623 to report suspected abuse and neglect of the four-year-old decedent. The court, Warfield Moore, Jr., J., granted summary disposition for defendants Detroit Medical Center, Children's Hospital, Huq, Rao, and Truong on the basis that the claims asserted against them were claims for medical malpractice that required the filing of affidavits of merit under MCL 600.2912d and no affidavits had been filed. The court denied summary disposition of the plaintiff's vicarious liability claims against the Detroit Medical Center and Children's Hospital. The plaintiff appealed, and Detroit Medical Center and Children's Hospital cross-appealed.

The Court of Appeals *held*:

1. A two-part test is employed to determine whether a claim sounds in ordinary negligence or medical malpractice. First, whether the claim pertains to an action that occurred within the course of a professional relationship. Second, whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. If a jury can evaluate the reasonableness of an action only after the presentation of expert testimony, the claim sounds in medical malpractice.

2. There is no dispute that there was a professional, doctor-patient relationship between the defendant doctors and the decedent.

3. Because MCL 722.623 applies to occupations outside the medical field as well as those within the medical field and requires

all the persons in those occupations to make the same determinations on the basis of the same standard: "reasonable cause to suspect child abuse or neglect," the determination regarding whether there is reasonable cause to suspect abuse or neglect does not require the use of medical judgment. Therefore, the second part of the test cannot be answered in the affirmative and this action does not sound in medical malpractice.

4. An action against a doctor for complying with, or failing to comply with, the Child Protection Law, MCL 722.621 *et seq*., is entirely separate from an action against that doctor for medical malpractice in treating the child. The trial court erred by granting summary disposition on the basis that the action was a medical malpractice action. The order granting summary disposition must be reversed and the case must be remanded for further proceedings.

5. A well-settled common-law principle such as the doctrine of vicarious liability cannot be abolished by implication. There is no language in MCL 722.633(1), which provides a civil remedy for a violation of MCL 722.623, that expressly abolishes the common-law doctrine of vicarious liability. The trial court did not err by holding that an employer may be held liable for its employee's failure to report under MCL 722.623 and by denying the motion for summary disposition of the vicarious liability claims.

Affirmed in part, reversed in part, and remanded for further proceedings.

O'CONNELL, J., dissenting, stated that although the requirements for reporting suspected abuse under MCL 722.623 might appear to be identical regardless of the profession of the reporting individual, the process that each profession brings to the determination whether a reasonable cause to suspect that child abuse exists is significantly different. Doctors are required to find objective evidence that abuse occurred and cannot simply presume that abuse has occurred. A doctor's act of finding abuse involves medical judgment. The doctor must follow the standard of care for each diagnosis and each patient. For a doctor to presume that abuse is the cause and origin of certain trauma would be a violation of the standard of care. This case clearly is a medical malpractice cause of action because the doctors could not have determined whether the child's injuries were caused by abuse or something else unless they exercised their medical judgment. They are entitled to defend themselves under the proper standard. The claims of ordinary negligence against the doctors and the vicarious liability claims against the corporate defendants premised on the ordinary negligence claims against the doctors should fail. Summary disposition of the vicarious liability claims should have been granted.

1. CHILD ABUSE — CHILD PROTECTION LAW — DUTY TO REPORT SUSPECTED ABUSE.

The statute that requires certain individuals both inside and outside the medical field who have reasonable cause to suspect child abuse or neglect to immediately report the suspected abuse or neglect does not require such individuals to use medical judgment to determine whether there is reasonable cause to suspect abuse or neglect (MCL 722.623).

2. ACTIONS — CHILD PROTECTION LAW — MEDICAL MALPRACTICE.

An action against a doctor relating to the duty imposed by the Child Protection Law to report suspected child abuse is entirely separate from an action against the doctor for medical malpractice in treating a child (MCL 722.621 *et seq*.).

3. ACTIONS — CHILD PROTECTION LAW — DUTY TO REPORT SUSPECTED ABUSE — VICARIOUS LIABILITY.

The Child Protection Law in providing a civil remedy for a violation of the provision of the act that imposes on certain individuals a duty to report suspected child abuse or neglect did not abolish the common-law doctrine of vicarious liability with regard to the employers of the individuals who have the duty to report such abuse or neglect (MCL 722.623, 722.633[1]).

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Geoffrey N. Fieger*, *Lloyd G. Johnson*, and *Heather A. Jefferson*), for the plaintiff.

Tanoury, Corbet, Shaw, Nauts & Essad, P.L.L.C. (by *Linda M. Garbarino* and *Daniel R. Corbet*), for the Detroit Medical Center, Children's Hospital, Dr. Ahm Mahbobul Huq, and Dr. Jayshree Rao.

Giarmarco, Mullins & Horton, P.C. (by *LeRoy H. Wulfmeier, III*, and *Jennifer A. Engelhardt*), for Dr. Vince Truong.

Before: WHITBECK, P.J., and O'CONNELL and OWENS, JJ.

OWENS, J. Plaintiff, Adriana Lee, as personal representative of the estate of Rufus Young, Jr., deceased,

appeals as of right the trial court's November 13, 2007, order granting defendants Detroit Medical Center (DMC), Children's Hospital, Dr. Ahm Mahbobul Huq, Dr. Jayshree Rao, and Dr. Vince Truong summary disposition and dismissing plaintiff's statutory liability claims against them without prejudice. Defendants DMC and Children's Hospital cross-appeal, arguing that the trial court erred by denying their motion for summary disposition of plaintiff's vicarious liability claims. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the murder of plaintiff's four-year-old brother, Rufus Young, Jr., while in the care of his foster parents, Tara and Roderick Hall. Rufus Young, Jr., was born on September 28, 1998, to Lynda Lee and Rufus Young, Sr. Lee used crack cocaine and alcohol during her pregnancy, and Rufus Jr. tested positive for cocaine at birth.

After years[1] of involvement by the Family Independence Agency (FIA)[2] and Child Protective Services (CPS), Rufus Jr. and his four siblings were removed from their biological parents in March 2002 because of neglect.[3]

Rufus Jr. and his sister, Junette, were initially placed in the foster home of Sonceria Cooperwood. Cooper-

[1] Rufus Jr.'s oldest sibling was removed from her mother's care in the late 1980s because of the mother's substance abuse, and she remained in foster care for five years. Further, the three complaints that ultimately led to removal of the children in 2002 began in 1998.

[2] The agency is now the Department of Human Services.

[3] There was a history of substance abuse by the parents, and the home was found to be without gas service or sufficient beds for Rufus Jr. and his siblings.

wood recalled that Rufus Jr. had urinary problems, eczema,[4] and dental problems while in her care. She also noted that Rufus Jr. had a hearty appetite and that, at night, he would take food from the refrigerator and hide it under his pillow. Cooperwood took Rufus Jr. to the emergency room at Children's Hospital on March 25, 2002, because of a rash on his face and trunk. He was diagnosed with contact dermatitis. On April 3, 2002, Rufus Jr. was examined by Dr. Anthony Clarke, a pediatrician, who also noted that Rufus Jr. had eczema, as well as enuresis,[5] and that he hoarded food and ate until he vomited.

In late April 2002, Cooperwood became unable to care for the children, and they were placed with Tara and Roderick Hall on April 23, 2002. At the time of placement with the Halls, Rufus Jr. was described as "chunky." In subsequent updated services plans, Rufus Jr. was described as "robust . . . [with] an enormously healthy appetite." However, as of January 2003, Rufus Jr.'s weight had dropped to 28 pounds.

On January 2, 2003, Rufus Jr. was taken to his family doctor, Dr. Dennis Treece, because of multiple concerns, including Rufus Jr.'s refusal to toilet train, his inability to gain weight, and his weight loss. Dr. Treece referred Rufus Jr. for a developmental assessment at Children's Hospital for his "failure to thrive."

On February 15, 2003, Drs. Rao and Truong saw Rufus Jr. in the emergency room of Children's Hospital. Dr. Truong, a first-year resident at the time, did the initial physical examination of Rufus Jr. He then advised Dr. Rao of his findings, and she conducted her own

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[4] Eczema is defined as the "[g]eneric term for inflammatory conditions of the skin . . . ." *Stedman's Medical Dictionary* (26th ed), p 543.

[5] Enuresis is defined as "[u]rinary incontinence; may be intentional or involuntary but not due to a physical disorder." *Id.*, p 579.

physical examination of Rufus Jr. Tara Hall told the doctors that she was there for a second opinion on why Rufus Jr. was not growing and because Rufus Jr. was having tremors. She said that he had a history of tremors and weight loss, and she told the doctors of the upcoming appointment at Children's Hospital regarding his assessment for failure to thrive. Tara Hall also stated that there was a history of physical abuse by the biological parents, as well as drug and alcohol exposure at birth.

In his report, Dr. Truong noted that Rufus Jr.'s skin had "multiple bruising suggesting history of abuse." Dr. Truong testified that he observed both old and new bruises on Rufus Jr. He further noted that Rufus Jr. was withdrawn, underweight, and mildly shaking during the examination. Dr. Truong testified that he did not suspect any abuse by the foster mother because she seemed very concerned, very genuine, and very caring. He did not feel that filing a Form 3200[6] was warranted in this case because the history given by Tara Hall was consistent with his findings, so he had no suspicion of foul play.

Dr. Rao signed off on Dr. Truong's report, stating, "I find the history and physical examination to be consistent with that documented by the resident." However, she testified that the note in Dr. Truong's report, which states that there were bruises, was incorrect. She stated that it should have said marks or scars,[7] not bruises, because there were no bruises on Rufus Jr. And Dr. Rao stated that if there had been bruises on Rufus Jr., she would have contacted the hospital's social worker. Like Dr. Truong, Dr. Rao did not suspect any abuse by the foster mother.

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[6] Report of Actual or Suspected Child Abuse or Neglect.

[7] Defendants take the position that what Dr. Truong noted in his report as bruises were really eczema scars, which defendants assert can look like bruises.

On February 25, 2003, Rufus Jr. was seen by Dr. Ahm Mahbobul Huq, a neurologist at Children's Hospital. Dr. Huq ordered further testing to determine the reason for Rufus Jr.'s failure to gain weight. Dr. Huq testified that he did not notice any bruises or marks on Rufus Jr. and he had no reason to suspect any past or current abuse or neglect.

Rufus Jr. was again seen by Dr. Treece on March 5, 2003. Dr. Treece referred Rufus Jr. to Dr. Clarke for assistance with Rufus Jr.'s failure to thrive. Dr. Treece did not recall any marks or bruises on Rufus Jr. when he examined him.

On April 5, 2003, Rufus Jr. was left for the day with his foster father, Roderick Hall. Tara Hall returned late in the evening and went to bed. In the early morning of April 6, 2003, Rufus Jr. was found unresponsive in his bedroom. Paramedics were called, and Rufus Jr. was taken to Sinai-Grace Hospital, where he was pronounced dead.

An autopsy was performed, revealing that Rufus Jr. died of cerebral edema that resulted from head trauma. The report noted that Rufus Jr. had suffered 11 blows to the head, as well as numerous blows to his body. His death was deemed a homicide. On April 8, 2003, Roderick Hall confessed. He was convicted of second-degree murder, and he was sentenced to 20 to 40 years in prison.

On December 20, 2004, plaintiff filed suit against defendants, alleging that defendants breached their statutory duty to report suspected child abuse and neglect under MCL 722.623 and 722.633.[8] On July 3,

[8] The case was removed to federal court. However, plaintiff dismissed the social worker defendants, and the case was remanded to the Wayne Circuit Court. Further, a settlement was reached between plaintiff and defendants Life Span Clinical Services and Kristin Ryeson Dzahristos in June 2007.

2007, defendants Dr. Rao, Dr. Huq, DMC, and Children's Hospital moved for summary disposition under MCR 2.116(C)(7), (8), and (10), asserting that they were entitled to dismissal of plaintiff's statutory claims because they were really claims for medical malpractice, requiring the filing of affidavits of merit under MCL 600.2912d. Dr. Truong concurred in this motion on July 6, 2007.

Dr. Huq filed a separate motion for summary disposition under MCR 2.116(C)(10), asserting that he was entitled to summary disposition because plaintiff's experts testified that he was not required to file a report of suspected child abuse or neglect.

Additionally, defendants DMC and Children's Hospital also moved for summary disposition under MCR 2.116(C)(7) and (8), arguing that they were entitled to dismissal of plaintiff's vicarious liability claims because MCL 722.633 does not provide for liability for anyone other than the person who fails to report. Plaintiff opposed defendants' motions.

The trial court entered an order on November 13, 2007, dismissing without prejudice plaintiff's statutory liability claims against defendants Dr. Rao, Dr. Huq, Dr. Truong, DMC, and Children's Hospital and denying defendants DMC and Children's Hospital's motion to dismiss plaintiff's vicarious liability claims. This appeal and cross-appeal followed.

II. STATUTORY CLAIM FOR DAMAGES

Plaintiff argues that the trial court erred by dismissing plaintiff's claims against defendants for breach of their statutory reporting duties. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Feyz v Mercy*

Mem Hosp, 475 Mich 663, 672; 719 NW2d 1 (2006). "A motion for summary disposition brought [under] MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Id*. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley*, *supra* at 278.[9]

Plaintiff's claim is based on defendants' failure to report suspected abuse and neglect under MCL 722.623, which provides, in pertinent part, as follows:

> (1) An individual is required to report under this act as follows:
>
> (a) A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by tele-

[9] Defendants' motion was brought under both MCR 2.116(C)(8) and (10), and the trial court did not specifically note under which section it was granting the motion. However, it appears that the motion was granted under MCR 2.116(C)(10) because the trial court relied on discovery depositions to make its decision. *Driver v Hanley* (*After Remand*), 226 Mich App 558, 562; 575 NW2d 31 (1997) (construing a motion as having been granted under MCR 2.116(C)(10) because the trial court relied on matters outside the pleadings).

phone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department.

MCL 722.622 defines child abuse and child neglect as follows:

(f) "Child abuse" means harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy.

* * *

(j) "Child neglect" means harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:

(*i*) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.

(*ii*) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.

MCL 722.633 sets forth the liability for failure to report:

(1) A person who is required by this act to report an instance of suspected child abuse or neglect and who fails to do so is civilly liable for the damages proximately caused by the failure.

(2) A person who is required by this act to report an instance of suspected child abuse or neglect and who knowingly fails to do so is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

Defendants assert that because the alleged failure to report occurred during medical treatment and required the use of defendants' medical judgment, it is a medical malpractice claim, not an ordinary negligence claim. We disagree.

"The gravamen of an action is determined by reading the claim as a whole." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993). Further, our Supreme Court has articulated a two-part test to determine whether a claim sounds in ordinary negligence or medical malpractice. *Kuznar v Raksha Corp*, 481 Mich 169, 176-177; 750 NW2d 121 (2008), citing *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004).

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only " 'within the course of a professional relationship.' " Second, claims of medical malpractice necessarily "raise questions involving medical judgment." Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Bryant*, *supra* at 422 (citations omitted).]

In other words, if a jury can evaluate the reasonableness of an action only after the presentation of expert testimony, the claim sounds in medical malpractice. *Id.* at 423; see also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999).

There is no dispute in this case that there was a professional, doctor-patient relationship between the defendant doctors and Rufus Jr. See *Dyer v Trachtman*, 470 Mich 45, 50; 679 NW2d 311 (2004). Therefore, this case turns on the medical-judgment prong of the *Bryant* test.

Defendants contend that the determination regarding whether there is "reasonable cause to suspect abuse" requires the use of medical judgment. However, the plain language of the statute contradicts defendants' argument. The statute expressly states that it applies to more than just medical doctors. Indeed, it applies to several occupations outside the medical field, e.g., social workers, any person employed in a professional capacity by any office of the friend of the court, school counselors and administrators, teachers, members of the clergy, and regulated child care providers. These persons do not have any medical education or training, and yet they also are mandated by statute to make the same determination on the basis of the same standard: "reasonable cause to suspect child abuse or neglect." Therefore, because the same standard is applied to individuals outside the medical field, the determination regarding whether there is reasonable cause to suspect abuse or neglect does not require the use of medical judgment.

Further, this Court has held that a person required to report under MCL 722.623 is not free to arrogate to himself the right to foreclose the possibility of a legal investigation by the state. *People v Cavaiani*, 172 Mich App 706, 715; 432 NW2d 409 (1988). Indeed, in *Cavaiani*, the defendant, a psychologist and family therapist, was told by his nine-year-old client that her father fondled her breasts. However, the defendant did not report the abuse because he was convinced, after talking with the father,

that if there was any touching, it was accidental and not for sexual arousal or gratification. The defendant was charged with a misdemeanor under MCL 722.633 for failing to report the abuse. The trial court dismissed the charge against the defendant, reasoning that the defendant may have concluded, on the basis of his professional judgment, that the information supplied to him was inaccurate or a fantasy. This Court rejected the trial court's reasoning, concluding that even if the defendant personally believed that there was no child abuse, he was still required to report the possibility and allow the state to investigate because the state has different interests. *Cavaiani*, *supra* at 715.

Likewise, in *Williams v Coleman*, 194 Mich App 606, 616-617; 488 NW2d 464 (1992), this Court rejected the defendant social workers' argument that the decision to report involves significant decision making to assess the reasonableness and dependability of information, noting that *Cavaiani* refuted such an approach. Therefore, doctors are left with little, if any, discretion in reporting. Rather, MCL 722.623 (1)(a) provides that if there is any "*reasonable cause to suspect*" [emphasis added] abuse or neglect, the doctor must report it immediately and let CPS investigate the case to determine the validity of the information provided.[10]

We also note that the Child Protection Law, MCL 722.621 *et seq*., contains civil and criminal liability provisions (MCL 722.633), as well as an immunity provision (MCL 722.625). The provisions apply to mandated reporters as follows: (1) a person who knowingly fails to report when required to do so incurs criminal

[10] A diagnosis of abuse or neglect is not required by the statute; a reasonable suspicion that the child has suffered abuse or neglect is sufficient to trigger the reporting requirement.

liability; (2) a person who fails to report when required to do so incurs civil liability; (3) a person who reports in good faith is immune from any civil or criminal liability that might otherwise be incurred as a result of that action.

MCL 722.625 then clarifies that the grant of immunity applies only to acts required by the Child Protection Law:

> [T]his immunity from civil or criminal liability extends only to acts done according to this act [reporting, cooperating, or assisting as required by the act] and does not extend to a negligent act that causes personal injury or death or to the malpractice of a physician that results in personal injury or death.

Therefore, it is clear that an action against a doctor for complying with, or failing to comply with, the act is entirely separate from an action against that doctor for medical malpractice in treating the child. For example: a doctor suspects abuse because of broken bones and files a report under this act. In actuality, the child was not abused but suffers from brittle bone disease. As a result of the doctor's failure to diagnose brittle bone disease, the child's condition goes untreated and the child suffers further fractures. If the doctor were sued for wrongful reporting, the doctor would have statutory immunity from civil liability. However, if the doctor were sued for medical malpractice for failure to correctly diagnose and treat the child's condition, the immunity provisions of the act would not protect the doctor. See *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722; 373 NW2d 204 (1985).

Thus, the trial court erred by granting summary disposition in this matter.

III. VICARIOUS LIABILITY

Defendants argue that the trial court erred by denying defendants DMC and Children's Hospital's motion for summary disposition with regard to plaintiff's vicarious liability claims. We disagree.

Again, this Court reviews de novo a trial court's decision on a motion for summary disposition. *Feyz*, *supra* at 672. Likewise, statutory interpretation is a question of law that this Court also reviews de novo. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005).

"Vicarious liability is indirect responsibility imposed by operation of law." *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988). It is " 'based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other.' " *Id*. (citations omitted). Accordingly, " 'a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment.' " *Rogers v J B Hunt Transport*, *Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002), quoting *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928).

Here, the trial court denied defendants' motion for summary disposition regarding plaintiff's vicarious liability claim. Defendants DMC and Children's Hospital challenge that ruling on appeal, arguing that there is no vicarious liability in this case under the plain language of MCL 722.633(1).

The goal of statutory construction is to discern and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). This Court must ascertain the legislative intent that may be inferred from

the words of the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). "When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted." *Id.* " 'Statutory language should be construed reasonably, keeping in mind the purpose of the act.' " *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006) (citation omitted).

Generally, when a statute provides new rights and remedies, those remedies are exclusive. *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 529; 734 NW2d 533 (2007). However, statutes in derogation of the common law are narrowly construed. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981). And well-settled common-law principles are not to be abolished by implication. *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008).

MCL 722.633(1) provides the following civil remedy for violation of MCL 722.623:

> A person who is required by this act to report an instance of suspected child abuse or neglect and who fails to do so is civilly liable for the damages proximately caused by the failure.

Defendants argue that the plain language of MCL 722.633 limits liability to individual liability only. However, a well-settled common-law principle, such as the doctrine of vicarious liability, cannot be abolished by implication. And there is no language in the statute that expressly abolishes the doctrine.

Although governing a different subject matter entirely, the Michigan no-fault automobile insurance act, MCL 500.3101 *et seq.*, has been the basis for several decisions that provide us guidance in this

matter. In each of the following cases the enactment of the law did not extinguish common-law doctrines that existed before the enactment of the no-fault act. In *Adams v Auto Club Ins Ass'n*, 154 Mich App 186, 194-195; 397 NW2d 262 (1986), the plaintiff argued that because there is no section of the no-fault act that entitles insurers to maintain actions against insureds to recover overpaid work-loss benefits unless duplicate payment is received from a collateral source, the defendant was not entitled to reimbursement for any overpayments made to the plaintiff. The *Adams* Court disagreed and held that the enactment of the no-fault act did not extinguish common-law doctrines predating that legislation, specifically that the common-law rule permitting recoupment of payments was not abolished by the no-fault act. In *Bak v Citizens Ins Co of America*, 199 Mich App 730, 737-738; 503 NW2d 94 (1993), this Court concluded that because the no-fault act did not specifically abrogate the common-law principle of mitigation of damages, the defense remains available. See also *Struble v Detroit Automobile Inter-Ins Exch*, 86 Mich App 245, 250; 272 NW2d 617 (1978) (common-law tort rule "should not be considered as abrogated unless there is a clear intent to do so," citing 73 Am Jur 2d, Statutes, § 181, p 384); *Rusinek*, *supra* at 508 (no-fault act did not abolish common-law actions for loss of consortium). A statute must not be construed to abrogate established common-law principles by implication. *Id.* at 507-508. Thus, we have a line of Michigan cases that all conclude that the common law should not be abrogated by statute unless it clearly appears that was the legislative intent.

Here, there is no indication that the Legislature intended to abrogate the common-law doctrine of vicarious liability. The preamble to the Child Protection Law

states that its purpose is, in part, "to provide for the protection of children who are abused and neglected . . . ." Allowing entities such as hospitals to be the subject of vicarious liability would further the stated goal of protecting children from abuse and neglect by encouraging appropriate supervision and training of mandated reporters and by encouraging organization-wide policies that comport with Michigan law.

We conclude that an employer may be held liable for its employee's failure to report under MCL 722.623 and that the trial court did not err by denying defendants' motion for summary disposition of plaintiff's vicarious liability claims.

The dissent argues that today's decision "handicaps the doctors of this state" and "strips doctors of the protections inherent in a medical malpractice cause of action." To the contrary, our decision requires nothing more of doctors than the plain language of the statute has always required of them: to report when they reasonably suspect that a child has been abused or neglected as defined by the statute. Neither the statute nor precedentially binding appellate caselaw has ever provided that a doctor could only be sued for medical malpractice rather than for ordinary negligence for failure to report reasonably suspected abuse or neglect. Therefore, our decision does not take something from doctors that they possessed heretofore. In fact, we merely hold that doctors are held to the same standard as every other similarly situated person, that is, all of the other statutorily mandated reporters.

In enacting the statute, the Legislature knowingly included many occupations that regularly come in contact with children, such as teachers, school counselors, social workers, child care providers, physicians, den-

tists, nurses, and psychologists, among others, and required all of them to report on the same basis: if there is a reasonable cause to suspect child abuse or neglect. The Legislature could have provided different standards for reporting based on the differing knowledge and experience of those mandated to report, but it did not do so. We cannot read different standards into the act. "It is axiomatic that when the language of an act clearly enunciates a standard . . . it is repugnant to attempt to judicially read into the act other requirements or conditions that operate to defeat or limit its aim." *Kidd v Gen Motors Corp*, 414 Mich 578, 588; 327 NW2d 265 (1982).

The dissent alarmingly speculates that doctors will now "report all incidents involving a bump or a bruise" in order to protect themselves from "frivolous lawsuits." This fear is belied by the words of the statute: it does not require every bump or bruise on a child be reported. Only those injuries that raise a reasonable suspicion of child abuse or neglect must be reported. Most bumps and bruises are accidentally sustained in the course of a child's play. However, some injuries are not innocently acquired. Some injuries, by their very nature, raise a reasonable suspicion of child abuse: facial bruises in the shape of the fingers of an adult hand, bruises to the back, buttocks, or legs in the shape of a looped electrical cord, rope burns to the wrists and ankles, a burn in the shape of an iron on a child's back. Other injuries may not be suspicious by themselves, but may become reasonably suspicious because the explanation given does not match the injury: it could not have occurred in the manner given, or because the explanations given upon questioning change over time.

If a child is presented to a doctor with an inherently nonsuspicious injury, the caregiver's explanation is in-

nocent, consistent, and reasonably explains the injury, and there are no other indicia of child abuse or neglect present, the doctor would not reasonably suspect child abuse or neglect and would not be under a duty to report. However, if a doctor reasonably suspected child abuse or neglect, that doctor would be statutorily required to report. As with all other mandated reports, the failure to report when required to do so would be judged under an ordinary negligence standard.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

WHITBECK, P.J., concurred.

O'CONNELL, J. (*dissenting*). I respectfully dissent. Although I appreciate the altruistic nature and concern for children's health and welfare that the majority displays in its opinion, the unintended consequences of the majority's opinion are untenable. The majority opinion creates a scenario that, in effect, requires doctors to report to the Department of Human Services (DHS) all injuries to any children in their care if there exists "reasonable cause to suspect abuse" according to an abstract, nonspecific standard, even if their medical judgment leads them to believe otherwise. The majority strips doctors of the protections inherent in a medical-malpractice cause of action, which would hold a doctor to the standard of care in his profession when determining whether a "reasonable cause to suspect abuse" exists. By declaring that a doctor's failure to report suspected abuse sounds in ordinary negligence and not in medical malpractice, the majority essentially handicaps the doctors of this state, requiring them to report any circumstance in which a child in a doctor's care is discovered to have a bump or bruise that a layperson

might find indicative of abuse, even if, upon examination, the doctor makes a medical determination that the injury is not a sign of abuse. When a doctor acting in his professional capacity, as has occurred in this case, has "reasonable cause to suspect child abuse," this suspicion necessarily arises from the doctor's professional *medical* determination that child abuse might have occurred. Accordingly, plaintiff's cause of action against Drs. Rao and Truong sounds in medical malpractice, not in negligence.[1]

THE ROLE OF DOCTORS IN OUR SOCIETY
(FINDING ABUSE VERSUS PRESUMING ABUSE)

The majority opinion fails to take into account the obvious—that there exists a significant difference between the role of doctors in our society and the role of other professionals in society. Doctors are required to *find* objective evidence that abuse has occurred—that is their charge or role in our society. Doctors search for and find the cause and origin of medical issues in their patients. They cannot simply *presume* that abuse has occurred. Finding abuse requires medical judgment on the part of the doctor. Unlike in other professions, in the medical profession there exists a standard of care for each diagnosis and each patient. For a doctor to *presume* that abuse is the cause and origin of certain

[1] The majority essentially asserts that in the setting of a doctor's office or hospital emergency room, "reasonable cause to suspect abuse" does not require the use of medical judgment and, therefore, an action can be filed against the doctor for ordinary negligence. After the majority opinion in this case is released, I suspect that in order to avoid frivolous lawsuits for failure to report incidents under the statute, doctors will report all incidents involving a bump or bruise to the DHS, and the DHS will then be required to investigate all these claims.

trauma would be a violation of the standard of care owed to that patient and to society in general.[2]

Other professions, such as teachers and others named in the statute, upon observation of a student, or for that matter a report by a student, are entitled, without violating a standard of care, to presume abuse and are required to report that which they presume occurred. There exists no professional medical judgment involved in this process. Stated another way, one profession *presumes* abuse, the other is required to *find* objective evidence of abuse. In my opinion, to conflate the role of one profession within our society with that of another is simply a failure to comprehend the synergetic relationships of each part of our society. The majority implies that because doctors have immunity for all false reporting claims, they are relieved of the duty of *finding* objective evidence of abuse and therefore are simply held to a layperson's standard of *presuming* abuse and reporting it. I suspect that most medical schools and most doctors will be interested in

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[2] I concur with the majority opinion to the extent that if a patient walks into a doctor's office or an emergency room and reports that her boyfriend, stepfather, relative, or other person has been abusing a child, then, under those specific facts, the doctor is not required to find abuse and no medical judgment is involved.

The majority cites only two cases to support its position that "reasonable cause to suspect abuse" does not require medical judgment, *People v Cavaiani*, 172 Mich App 706, 715; 432 NW2d 409 (1988), and *Williams v Coleman*, 194 Mich App 606, 616-617; 488 NW2d 464 (1992). However, both cases are distinguishable from the present case. I note that *Cavaiani* is a criminal case, not a civil negligence case and therefore is of little assistance in the present case. More importantly, in *Cavaiani* the defendant, a psychologist and family therapist, was told by his nine-year-old client that her father had fondled her breasts. As noted above, under this set of facts, the psychologist was not required to *find* objective evidence of abuse and no medical judgment is involved. In *Williams*, the defendants were social workers, not doctors, and therefore that case is of less assistance to the present case than *Cavaiani*.

this new presumed abuse standard. Fortunately, I am of the opinion that doctors must *find* objective evidence that abuse has occurred, and the act of *finding* abuse, in my opinion, involves medical judgment.

DISCUSSION OF THE CASE

Plaintiff's claims against Dr. Rao and Dr. Truong arise from their February 15, 2003, emergency room examinations of Rufus Young, Jr. Tara Hall, Rufus's foster mother, advised the doctors that Rufus had been exposed to drugs and alcohol before his birth and that his biological parents had physically abused him. Hall advised the doctors that Rufus had multiple problems, including a refusal to toilet train, an inability to gain weight, and a history of tremors and weight loss, and she advised them of an upcoming medical appointment to address Rufus's failure to thrive. Drs. Truong and Rao then examined Rufus and concluded, in their professional opinions, that there was no reason to suspect current abuse.

As the majority notes, there is no dispute in this case that there was a professional doctor-patient relationship between the doctors and Rufus, so this case turns on the medical judgment prong of the *Bryant* test, which is set forth in the majority opinion. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). In this case, both Dr. Rao and Dr. Truong testified that they did not have reasonable cause to suspect abuse. Dr. Rao's original report noted that the diagnosis by Dr. Truong, a first-year resident at the time, was incorrect; Dr. Truong's report should have said that there were marks or scars on Rufus, not bruises. Dr. Rao also testified that if there had been bruises, she would have notified the social worker. Further, defendants noted that Rufus had a history of

eczema and that a first-year resident could easily mistake eczema scars for marks caused by abuse.

In light of these facts, the doctors' failure to report illustrates my point: the doctors used their medical judgment to identify Rufus's symptoms and determine whether they were indicative of abuse. Drs. Rao and Truong made medical determinations on the basis of their different levels of expertise to determine whether the marks on Rufus's skin were scars or bruises, and whether they were caused by eczema or abuse. These questions can only be answered after some application of medical knowledge or expertise—an individual cannot tell the difference between eczema and bruising, for example, without first learning how eczema and bruising form and how they appear on the skin during different stages of development and healing. Further, a first-year resident likely would not exhibit the same level of expertise as the attending physician in making this determination. Accordingly, a determination regarding whether marks on a child's body indicate abuse or are the result of some other medical condition constitutes a "medical judgment beyond the realm of common knowledge and experience," which is indicative of a cause of action for medical malpractice, not negligence.

The majority determines that because MCL 722.623 applies to several occupations outside the medical field, the cause of action against the individual doctors necessarily rests in ordinary negligence, not medical malpractice. Yet this is an overly simplistic reading of the statute. True, the statute mandates that teachers, child care providers, and others employed outside the medical field are also obligated to report child abuse if they have reasonable cause to suspect it. However, the majority fails to recognize that the capacity of an individual to have "reasonable cause to suspect child abuse" depends

in large part on whether that individual is a physician, a counselor, a social worker, a teacher, or a member of one of the other listed professions.

For example, a teacher might conclude that a student who arrives in school with strange discolorations on his arms and face might have been bruised and, given this observation, she might have reasonable cause to believe that the student had been abused. Therefore, she would be required to report under the statute. Conversely, a doctor examining the discolorations on this child might determine that these same discolorations were not bruises, but flare-ups of eczema. Although a layperson might think that these discolorations were signs of abuse, the doctor, *through the exercise of his medical judgment*, would not have reasonable cause to believe that this child had been abused. Although the teacher's lack of medical expertise would render her suspicion of abuse or neglect reasonable, a doctor's exercise of his medical judgment could indicate that he did not have reasonable cause to suspect that a suspicious discoloration on the child's skin was indicative of abuse or neglect. When a physician acts in his professional capacity, his determination that he has reasonable cause to suspect child abuse or neglect necessarily arises from the exercise of his medical judgment; by extension, so does any failure to recognize such abuse or neglect[3]. This is not an ordinary negligence situation—a

[3] When addressing the question whether, in the setting of a hospital emergency room, "reasonable cause to suspect abuse" requires the use of medical judgment, the trial court answered in the affirmative, plaintiff's experts answered in the affirmative, and the individual defendants answered in the affirmative. Needless to say, I concur with the determination of defendants, plaintiff's experts, and the trial court.

In particular, I note that plaintiff's expert witnesses, Dr. Roy Antelyes and Dr. Robert Lerer, noted that in the setting of a hospital emergency

layperson cannot judge whether the doctor's actions

room or a doctor's office, a doctor's medical judgment is essential to determine if there is a "reasonable suspicion of abuse." Dr. Antelyes testified as follows:

> *Q*. And how does the physician go about coming up with a suspicion of abuse?
>
> *A*. Well, part of that has to do with your *education and experience*. Part of it has to do with the *historical data* that you have obtained from somebody who brought it to your attention. Part of it is your *physical examination and/or laboratory testing*. And I think I probably covered pretty much all of it. [Emphasis added.]

Dr. Robert Lerer testified:

> *Q*. On February 15th, 2003, do you know if any of those bruises or marks on his body were fresh versus old?
>
> *A*. No.
>
> * * *
>
> *Q*. *Now every patient in the Children's Hospital emergency department that shows up with bruises, you don't automatically file a suspected child abuse form, do you?*
>
> *A*. *No, no.* I don't think so, and, you know, I've worked in the emergency room at various times in my career, although it's been more than fifteen years since I worked in the ER seeing patients, but the patients present to your office just like they do in the emergency department with bruises and so forth.
>
> *Not every child that has bruises has been abused.* Children fall, sometimes children injure themselves in the course of play activities. Sometimes children, you know, fight and may be bruised in that particular fashion. So accidental injuries of any sort caused by whatever can produce bruises.
>
> *Q*. How does the physician in the emergency department or in the office . . . determine whether or not the bruises are the type that should be reported to Protective Services?
>
> *A*. First of all, *the history is very important.* If I have—and I'll give you some for instances to explain each point.
>
> *The history is very important. If you have a history of an event occurring and the bruise or bruises do not match the event*, then

were negligent in the way that he could judge the teacher's, because unlike the teacher, the doctor's determination whether abuse did or did not occur would arise from his understanding of the science behind the

> you immediately become suspicious that you're not getting a true picture and, therefore, child abuse becomes prominent in your *differential diagnosis*, so that would be number one.
>
> *Number two, I think you tend to see what the social situation is like.* Now, I have seen children bruised, indeed, I had one patient fatality where both parents were physicians, so I'm not implying that if you're in a low socioeconomic home, that you are more likely to be necessarily abused than if you come from a higher class family, but nevertheless, if you are in a chaotic home situation, if you have a single parent with a boyfriend in the home, then you become more suspicious in situations where you're thinking is this abuse or is this an accidental type of injury.
>
> I think associated findings are also important, in my estimation. This child had one very important finding, and that is that from the time that he was placed in the foster home, he actually dropped weight.
>
> * * *
>
> *A. I don't think I can look at the pictures and exclude the possibility that some old eczema that is now healed has produced some hyperpigmented areas.*
>
> * * *
>
> *A. If the bruises have the appearance of being three months or older to the examining physician and some history is obtained by the examining physician that the biological family, known to be abusive or neglectful or both, did them and there's no further history elicited that the child currently is in an abusive foster home, then the physician might be justified under such circumstances as to not contact Protective Services under such a hypothetical.* [Emphasis added.]

This testimony indicates that a physician's determination of abuse is subjective, involving clinical findings and medical judgment. As such, it is beyond the common expertise of an ordinary person and requires medical testing to substantiate. Therefore, the cause of action is for medical malpractice, not ordinary negligence.

symptoms. An expert would be needed to explain how abuse could be recognized through a medical examination and whether a doctor's diagnosis or failure to recognize abuse comported with the standard of care. Therefore, any potential error in judgment on the part of a doctor in such a scenario sounds not in ordinary negligence, but in medical malpractice.

Although on the surface, the requirements of reporting suspected abuse under MCL 722.623 might appear to be identical regardless of the profession of the reporting individual, the process that each profession brings to the determination whether a reasonable cause to suspect that child abuse exists is significantly different. Conversely, the majority lays all its eggs in one basket: under the majority's theory, if a layperson can be sued for ordinary negligence for committing a certain act, then a doctor can be sued for ordinary negligence for committing the same act. This clearly defies the intent behind the medical malpractice cause of action, which establishes a process that is distinct from an ordinary negligence claim to bringing a cause of action against doctors for errors committed during the doctor-patient relationship, because such errors are often based on medical judgments beyond the realm of common knowledge and experience and require the introduction of expert testimony to ensure proper disposition of the claim.

In my opinion, this is clearly a medical malpractice cause of action because these doctors could not have determined whether Rufus's injuries were caused by abuse or something else unless they exercised their medical judgment. Therefore, they are entitled to defend themselves under the proper standard. Because plaintiff's claims of ordinary negligence against Drs. Rao and Truong should fail, her vicarious liability claims against the corporate defendants, which

are premised on the ordinary negligence claims against the individual doctors, should fail as well.

The motion for summary disposition should have been granted. I would reverse and remand for proceedings consistent with this opinion.

YKIMOFF v W A FOOTE MEMORIAL HOSPITAL

Docket No. 279472. Submitted February 3, 2009, at Detroit. Decided July 16, 2009, at 9:00 a.m.

James Ykimoff brought a medical malpractice action in the Jackson Circuit Court against W.A. Foote Memorial Hospital, David Eggert, M.D., and David Prough, M.D., seeking damages for injuries related to a blood clot that formed following an aortofemoral bypass graft surgery. The court, Edward, J. Grant, J., dismissed Prough from the action and granted partial summary disposition for the hospital and summary disposition for Eggert after considering deposition testimony by the plaintiff's expert witness that Eggert had not breached any applicable standard of care. The remainder of the plaintiff's claims against the hospital, premised on the negligence of the nurses' monitoring the plaintiff's condition after the surgery and failing to report his status and symptoms to Eggert in a timely manner, proceeded to a jury trial. The jury returned a verdict in the plaintiff's favor, to which the court applied the noneconomic damages cap provided in MCL 600.1483(1) for medical malpractice actions. After the court denied the hospital's motion for a new trial or judgment notwithstanding the verdict, the hospital appealed. The plaintiff cross-appealed.

The Court of Appeals *held*:

1. While Eggert indicated that he would not have intervened earlier even if the nursing staff had contacted him regarding the changes in the plaintiff's postoperative condition, the opinion of the plaintiff's expert created a question of fact regarding whether the blood clot caused the plaintiff's injuries, and that question was solely for the jury to decide. The plaintiff was required to prove that the hospital's negligence was the proximate cause of the plaintiff's injuries, that is, that it more probably than not caused those injuries. Eggert's assertion that he would have not acted differently or intervened sooner was speculative, and discrepancies between his testimony and the symptoms documented by the nurses raised issues of credibility. Because establishing proximate cause hinged on the credibility of Eggert's averments, the trial court properly submitted the matter to the jury for resolution.

2. The factual circumstances of this case are distinguishable from those in *Martin v Ledingham*, 282 Mich App 158 (2009), on which the hospital relied, and *Martin* does not apply to this case.

3. The plaintiff pleaded only a basic negligence action, and it is not reviewable as a case of a lost opportunity to achieve a better result.

4. The trial court erred by permitting witnesses to testify regarding the plaintiff's integrity or character after the hospital submitted into evidence a surveillance video purportedly demonstrating that the plaintiff was not as physically limited as he alleged in his complaint. While the video impliedly impugned the plaintiff's truthfulness, the testimony went beyond the evidence of the plaintiff's reputation for truthfulness permitted under MRE 608(a)(2). The error, however, was harmless.

5. The trial court did not err by excluding testimony from members of the plaintiff's family indicating that the nursing staff had contacted Eggert and that he did not respond, which the standard of care required him to do. The testimony would have related to comments made by the nurses that the family members overheard. The statements, however, were not admissible as present sense impressions under MRE 803(1) or as statements of the declarant's then existing mental, emotional, or physical well-being under MRE 803(3).

6. Any failure by the trial court to give a curative instruction related to questions by the plaintiff's counsel on the statutory duties of nurses to document the administration of medications was harmless.

7. Under MCL 600.1483(1), the damages recoverable in a medical malpractice action for noneconomic loss are limited. If an exception applies, the damages recoverable are capped at a higher amount. MCL 600.1483(1)(c) allows use of the higher cap when there has been permanent loss or damage to a reproductive organ resulting in the inability to procreate. The plaintiff claimed that he suffered from erectile dysfunction, but he did not demonstrate that the condition precluded his ability to "beget offspring." Plaintiff also asserted that nerve damage resulted in a loss of sensation and inability to achieve or maintain an erection, not that there was damage to a reproduction organ. The trial court erred by applying the higher damages cap to the jury's award.

Affirmed in part, judgment vacated in part, and case remanded for recalculation of damages.

TALBOT, P.J., wrote further to express concern that the analysis of *Martin* in the concurring opinions might unnecessarily compli-

cate the factors to be used by courts in similar cases and to set forth his disagreement with Judge GLEICHER's comparison of *Martin* and this case.

BANDSTRA, J., concurred with Judge TALBOT's opinion and wrote separately to explain his conclusion that this case differed from *Martin* and his disagreement with Judge GLEICHER's approach to analyzing the issues.

GLEICHER, J., agreed that the trial court properly denied the hospital's motion for a new trial or judgment notwithstanding the verdict and correctly granted summary disposition for Eggert and that the higher cap for noneconomic damages did not apply, but disagreed that this case and *Martin* were logically distinguishable and wrote separately to further analyze that issue.

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Geoffrey N. Fieger*, *Robert M. Giroux*, *Jr.*, and *Heather A. Jefferson*), for James Ykimoff.

Foley, Baron & Metzger, PLLC (by *Judith A. Sherman* and *Clyde M. Metzger*), for W.A. Foote Memorial Hospital.

Before: TALBOT, P.J., and BANDSTRA and GLEICHER, JJ.

TALBOT, P.J. W. A. Foote Memorial Hospital ("defendant" or "the hospital") appeals as of right a judgment in favor of plaintiff, James Ykimoff, following the trial court's denial of its motion for a new trial or for judgment notwithstanding the verdict (JNOV) in this medical malpractice action. Plaintiff cross-appeals the trial court's order granting partial summary disposition, which resulted in the dismissal of plaintiff's malpractice claims against his surgeon, Dr. David Eggert. We affirm in part, vacate the judgment in part, and remand.

I. FACTS AND PROCEDURAL HISTORY

On November 7, 2001, because of circulation problems in his left hip resulting in claudication and pain,

plaintiff underwent an aortofemoral bypass graft. Dr. Eggert performed the surgery at the hospital. Reportedly, the duration of the surgery was prolonged because of the severity of the blockages in plaintiff's aorta below the renal arteries, which were described as being "rock-hard." During the procedure, Dr. Eggert was required to completely clamp off blood flow to plaintiff's legs. Surgery was initiated at 2:10 p.m., and plaintiff was not received in the post-anesthesia care unit (PACU) for monitoring until 6:26 p.m. Initially, when Nurse Melinda Piatt received plaintiff in the PACU, Doppler examination could detect posttibial pulses, and plaintiff demonstrated an ability to move his lower extremities.[1] However, shortly thereafter, plaintiff began to report consistent and severe pain, the loss of sensation in his legs, and pressure in his pelvis and lower extremities. Plaintiff's blood pressure was low when he was transferred to the PACU and dropped while in that unit. Plaintiff's legs were also observed to be pallid and cool while in the unit. At approximately 8:40 p.m., when the skin of plaintiff's right leg began to demonstrate mottling, the nursing staff contacted Dr. Eggert. Dr. Eggert returned to the hospital and was examining plaintiff by 9:12 p.m., at which time he determined that plaintiff needed to return to the operating room. At 9:45 p.m., Dr. Eggert commenced exploratory surgery to evaluate blood flow and found a clot in the graft site. A thrombectomy of the right limb of the aortofemoral graft was performed, removing a blockage to the blood supply to plaintiff's lower extremities.

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[1] Nurse Marlene Desmarais assumed primary nursing responsibility for plaintiff in the PACU at 7:45 p.m., even though Piatt remained in the unit until approximately 8:05 p.m. to complete charting and assist with patient care.

Following the second surgery, plaintiff experienced bilateral lower extremity weakness and numbness. He remained a patient at the hospital until November 13, 2001, when he was transferred to the University of Michigan Hospital (U of M) for further care and treatment. While at U of M, plaintiff was diagnosed with bilateral lumbar plexopathy due to ischemia or lack of blood flow. Although plaintiff's condition improved over time and with rehabilitation, he continues to report residual effects involving "tremendous deficits relative to the use of his legs."

On March 12, 2004, plaintiff filed this action, alleging medical malpractice against the hospital and Drs. Eggert and David Prough. While Dr. Prough was dismissed because of his lack of involvement in plaintiff's care, plaintiff alleged negligent treatment by both Dr. Eggert and the nursing staff of the hospital. With his complaint, plaintiff filed an affidavit of merit by Dr. Daniel Preston Flanigan to support his assertions of negligence and breach of the applicable standard of care. Specifically, Dr. Flanigan opined that defendants, while caring for plaintiff after the initial surgery, permitted "the vascular occlusion to exist for an extended period of time such that the lack of blood flow caused ischemia and the prolonged ischemia caused cell death and permanent damage to the muscles and nerves." The hospital and Dr. Eggert successfully obtained partial summary disposition regarding the claims against Eggert on the basis of deposition testimony by Dr. Flanigan that Dr. Eggert had not breached any applicable standards of care during his treatment of plaintiff.

A jury trial proceeded on the remainder of plaintiff's claims against the hospital, which alleged negligence of the PACU nurses, Piatt and Desmarais, in monitoring plaintiff's condition and failing to report his status and

symptoms to Dr. Eggert in a timely manner. The jury found in favor of plaintiff, and an order for judgment on the jury's verdict in the amount of $1,402,601.44 was entered on March 26, 2007, following application of the medical malpractice noneconomic damages cap. The trial court subsequently denied defendant's motion for JNOV or a new trial, and this appeal ensued.

II. SYNOPSIS OF CLAIMS

The claims of malpractice raised by plaintiff are premised on the care received in the hospital's PACU by the assigned nursing staff, Melinda Piatt and Marlene Desmarais, and their failure to contact Dr. Eggert regarding signs of a vascular emergency, which delayed surgical intervention for a blood clot. Plaintiff's expert witness contended that the blood clot began to form immediately following the first surgery and that the symptoms displayed by plaintiff in the PACU should have alerted the nursing staff to the condition and the need to contact the treating physician. Plaintiff's expert contended that earlier contact and resultant intervention would have either avoided any residual impairment now experienced by plaintiff or substantially reduced its severity.

In contrast, relying on testimony by Dr. Eggert, defendant asserts that the blood clot formed only minutes before plaintiff's skin demonstrated mottling and that any residual impairment is neurological in nature and derived from the necessity of prolonged clamping off of blood flow during the surgery because of the severity of the blockages. Defendant further contends that liability against the hospital is precluded by the inability to establish proximate causation, given Dr. Eggert's assertion that the symptoms demonstrated by plaintiff in the PACU did not indicate a vascular emergency and that even if he had been contacted and

informed of these symptoms earlier by the nursing staff, he would not have taken any action or intervened surgically.

III. STANDARD OF REVIEW

This Court reviews de novo both a lower court's decision on a motion for summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), and the grant or denial of a motion for JNOV, in the latter situation viewing "the evidence and all legitimate inferences in the light most favorable to the nonmoving party," *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004) (quotation marks and citations omitted). JNOV is properly granted only if the evidence fails to establish a claim as a matter of law. *Id.* Because issues of statutory interpretation involve questions of law, they are also subject to review de novo. *Eggelston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

A trial court's denial of a request for a curative instruction is reviewed for an abuse of discretion. *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992). Similarly, preserved evidentiary issues are reviewed for an abuse of discretion, *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), while unpreserved evidentiary issues are reviewed for plain error affecting the party's substantial rights, *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001); MRE 103(a)(1).

IV. ANALYSIS

A. NEGLIGENCE AND PROXIMATE CAUSE

The primary contention regarding whether plaintiff can establish his claim of malpractice centers on the

issue of proximate cause. Our Legislature has defined the applicable causation standard for medical malpractice cases in MCL 600.2912a(2), which provides in relevant part: "In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." The general principles pertaining to causation in an action for medical malpractice were recently reviewed by this Court in *Robins v Garg (On Remand)*, 276 Mich App 351, 362; 741 NW2d 49 (2007):

> "Proximate cause" is a term of art that encompasses both cause in fact and legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." *Id.* at 87. Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). " 'All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty.' " *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994), quoting 57A Am Jur 2d, Negligence, § 461, p 442. Summary disposition is not appropriate when the plaintiff offers evidence that shows "that it is more likely than not that, but for defendant's conduct, a different result would have been obtained." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479 n 7; 633 NW2d 440 (2001).

If circumstantial evidence is relied on to establish proximate cause, the evidence must lead to a reasonable inference of causation and not mere speculation. In addition, the causation theory must demonstrate some

basis in established fact. *Skinner*, *supra* at 164. As further guidance, our Supreme Court has stated:

> " 'As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.' " [*Id.*, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (citation omitted).]

In summary, when circumstantial evidence is relied on, it must provide a "reliable basis from which reasonable minds could infer that more probably than not, but for" the wrong or negligence an injury would not have occurred. *Skinner*, *supra* at 170-171.

Defendant contends that proximate cause cannot be established because Dr. Eggert definitively indicated he would not have intervened sooner even if the nursing staff had contacted him regarding changes in plaintiff's condition while in the PACU. In contrast, plaintiff argues that his expert's opinion regarding onset of the clot and breach of the applicable standard of care created a genuine issue of material fact pertaining to the issue of causation that was appropriately submitted and resolved by the jury. At the outset of analyzing this issue, it should be noted that the parties do not dispute that plaintiff experienced a blood clot in the graft site following the initial surgery. Rather, the parties disagree regarding the timing of the formation of the clot and its resultant effect on the residual impairments

claimed by plaintiff. In the most basic sense, this dispute, which relies on the opinions and credibility of plaintiff's expert and surgeon, clearly comprises a question of fact appropriate for a jury determination. Although Dr. Flanigan disagreed with Dr. Eggert regarding the onset or timing of the formation of the clot and the effect of delay in diagnosis and treatment, that disagreement did not contradict any of the established facts and, therefore, the opinion of plaintiff's expert was not impermissibly speculative. Flanigan's opinion created a question of fact regarding whether the blood clot caused plaintiff's bilateral lumbar plexopathy, which was solely within the purview of the trier of fact to resolve.

Although plaintiff has established a factual issue pertaining to the cause of his alleged injury, it remains incumbent on him to further demonstrate that the injury incurred was "more probably than not" caused by defendant's negligence. MCL 600.2912a(2). In this case, defendant contends that any negligence by the nursing staff in failing to timely identify the signs of a blood clot is irrelevant and cannot lead to an imposition of liability because proximate cause cannot be established given Dr. Eggert's unequivocal assertion that even if he had been notified or contacted earlier regarding plaintiff's condition, he would not have acted any differently or intervened any sooner. In asserting this position, defendant relies on this Court's recent decision of *Martin v Ledingham*, 282 Mich App 158, 163; 774 NW2d 328 (2009), which in turn cited caselaw from Illinois[2] and Ohio,[3] determining "that liability can be

[2] *Seef v Ingalls Mem Hosp*, 311 Ill App 3d 7; 724 NE2d 115 (1999).

[3] *Albain v Flower Hosp*, 50 Ohio St 3d 251; 553 NE2d 1038 (1990), overruled in part on other grounds by *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435 (1994).

imposed for a failure to adequately report to a physician only if the physician would have, *in fact*, altered a diagnosis or treatment had a better or earlier report been received." (Emphasis added.) Similar to the case now before this Court, in *Martin* the plaintiff alleged that the nursing staff was negligent in failing to report the plaintiff's worsening postsurgical condition to the treating physician and that such negligence comprised the proximate cause of her injuries. The treating physician in *Martin* averred

> that he had ample information regarding plaintiff and her situation throughout the period during which plaintiff alleges care was deficient, that he reviewed plaintiff's chart and was otherwise adequately apprised of developments, and that nothing the nurses could have done differently would have altered the care that he provided plaintiff. [*Id.* at 162.]

This Court upheld the trial court's grant of summary disposition in favor of defendants, "because there was no evidence showing that plaintiff's treatment would have been changed if better reporting had occurred . . . ." *Id.* at 159. In explaining the reasoning for this holding, the Court indicated "that a fact-finder's determination that there was cause in fact merely because the fact-finder disbelieved the doctors involved would be exactly the kind of speculation that *Skinner* disapproved in the absence of any affirmative cause-in-fact proof advanced by plaintiff." *Id.* at 163. The very fact-intensive nature of the ruling in *Martin* necessarily leads to concern regarding the broader applicability of that decision and the implied effect on legitimate issues pertaining to credibility in determining proximate causation and usurpation of the jury's role. Thus, we are required to cautiously evaluate the applicability of *Martin* to the factual circumstances of this case.

It is important to recognize that the factual circumstances of *Martin* are distinguishable from those of plaintiff's case. In *Martin*, the treating physician was apprised of his patient's condition on an ongoing basis, but elected not to intervene or alter the course of treatment despite having this information. Consequently, the physician in *Martin*, in averring that the nursing staff could not have done anything differently to affect his treatment decision, was describing his actual analysis of the presenting situation and subsequent action or inaction and was neither speculating nor relying on hindsight. His verbal assertions were consistent with his actual behavior. Therefore, because of the documented factual history, the physician's assertion was not subject to a credibility determination.

In contrast, Dr. Eggert's assertion that he would not have acted differently or intervened sooner, despite the fact that he was not kept informed of plaintiff's changing condition or symptoms, was speculative at best and self-serving at worst. Although Dr. Eggert acknowledged that given the protracted length of plaintiff's surgery, it was "critical to follow" his condition because of the potential for the formation of an occlusion or clot, he contended that until plaintiff evidenced mottling of the skin, the various symptoms he demonstrated in the PACU did not indicate a vascular emergency. Specifically, Eggert testified that until a full clot was formed, the mottling would not appear. He asserted that the mottling probably occurred within 5 to 10 minutes of the formation of the clot, suggesting very limited lead time to discern the need for intervention.

While testifying at trial, Dr. Eggert characterized the existence of mottling as an "obvious" and "dramatic" finding (i.e., "not subtle"), implying that other signs or symptoms should have been detected earlier. Because

the mottling was "clearly recognizable" when Dr. Eggert returned to the hospital, he immediately prepared plaintiff for a follow-up surgery. However, contrary to Dr. Eggert's own testimony that until the presence of the mottling a vascular condition could not be identified, he also testified that plaintiff's inability to use his leg or foot, coupled with the mottling, alerted the nursing staff to the presence of a vascular condition. Notably, the nursing staff observed and documented changes in plaintiff's ability to move his legs and loss of sensation in those extremities as early as 7:45 p.m., approximately one hour before Dr. Eggert was contacted by the PACU nurses.

The record clearly evidences the ongoing observation and consistent report of symptoms such as pain, pressure in the lower legs, lack of movement, sensation, and pulse, and problems with blood pressure almost from the moment of plaintiff's acceptance into the PACU. A review of Dr. Eggert's testimony demonstrates that the presence of these symptoms signified the onset of a clot detected earlier and consistently by PACU nurses before the "dramatic" and definitive symptom of mottling occurred. Specifically, Dr. Eggert acknowledged that an occlusion could cause pain. As early as 6:55 p.m., plaintiff consistently reported pain levels of 8 on a scale of 1 to 10 while in the PACU. Dr. Eggert also acknowledged that an occlusion could cause loss of sensation and movement. Nursing records indicate plaintiff had difficulty moving his legs and experienced a loss of sensation as early at 6:55 p.m.[4] Dr. Eggert also agreed that an occlusion could cause legs to look pale longer after surgery. Nursing notes and testimony indicated that plaintiff's legs were both pallid (more on the right

[4] Changes in plaintiff's ability to move his lower extremities were noted in the PACU record at least as early as 7:10 p.m.

than the left) and cool and did not demonstrate significant improvement while plaintiff was in recovery. In response to questioning, Dr. Eggert also acknowledged that pressure in the lower legs could be a sign of an occlusion. This is a symptom documented by PACU nurses at approximately 7:00 p.m. Dr. Eggert mistakenly believed that the feeling of pressure was exclusively in plaintiff's pelvis rather than his lower legs. In addition, Dr. Eggert opined that low blood pressure constitutes "one of the precipitating factors" in determining the existence of a clot. Plaintiff's blood pressure was low when he arrived in the PACU. In fact, the nursing staff could not administer an epidural in accordance with the anesthesiologist's orders because of plaintiff's blood pressure initially being too low. A review of the PACU record shows a significant drop in plaintiff's blood pressure at 8:10 p.m., but nursing staff acknowledged that plaintiff was having blood pressure problems as early as 7:55 p.m.

Dr. Eggert's admission that his postoperative notes summarized "what I thought" had transpired in the recovery room/PACU serves to demonstrate the speculative nature of his averment that the provision of timely information by nursing staff would not have affected his actions. In particular, because of the discrepancies between Dr. Eggert's testimony and the documented symptoms, Dr. Eggert's statement, "Regardless of what the record says, I know they're following the patient and assessing for vascular problems and did not find any *at all* until the thrombosis took place, at which time it became clear," raises issues of credibility. Dr. Eggert's absolute assertion that he would not have intervened sooner, even if the PACU nurses had contacted him and related plaintiff's symptoms, is particularly suspect because of the immediacy of his initiation of surgical intervention upon arrival at the hospital.

In *Martin*, the credibility of the treating physician was not called into question both because he was kept apprised of his patient's condition on an ongoing basis and because his actual behavior regarding medical intervention completely coincided with his subsequent assertions. However, unlike the physician in *Martin*, Dr. Eggert's credibility was not eliminated as an issue; rather it was pushed to the forefront. The reasoning in *Martin* cannot be applied pro forma to the factual circumstances of this case because its application is limited to situations demonstrating a conformance between verbal assertions and actual behavior. Because establishment of proximate cause hinged on the credibility of Dr. Eggert's averments, which could not be shown retrospectively to conform to the medical records and testimony elicited, the matter was properly submitted to the jury for resolution. *Skinner*, *supra* at 161.

This cautionary approach in evaluating averments such as those made by Dr. Eggert is supported by analyzing other "failure to inform cases," such as those relied on in *Martin*. In *Albain v Flower Hosp*, 50 Ohio St 3d 251; 553 NE2d 1038 (1990), overruled in part on other grounds by *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435 (1994), the defendant was found not to be liable because of the failure of nursing staff to fully inform the staff physician regarding the condition of the patient. A pregnant woman presented at the hospital with a bloody vaginal discharge. She was admitted, and after an initial examination by a resident, it was determined that the on-call staff obstetrician should be contacted. At the time, the obstetrician was seeing private patients at a site away from the hospital but was informed of the patient's condition and provided orders for her care. The obstetrician was updated approximately 90 minutes later and because of the information received, indicated that she would come to

the hospital by 5:30 p.m. at the conclusion of her office hours. The obstetrician did not finish at her office until 6:00 p.m. and, instead of proceeding directly to the hospital, went home to eat dinner. Staff again contacted the obstetrician at home at 7:00 p.m., and additional tests were ordered. The obstetrician did not examine the patient until 8:00 p.m. Following a consult with another physician, it was determined that the patient should be transferred to another hospital. By the time the patient was transferred and evaluated, an emergency cesarean section was performed, but the baby died of "complications of neonatal asphyxia . . . ." *Id.* at 253.

In *Albain*, the expert opined that medical intervention to avoid the injury needed to have occurred between 4:00 p.m. and 5:00 p.m. *Id.* at 265. Although the nursing staff failed to inform the on-staff obstetrician of the vaginal bleeding, the obstetrician indicated that if she had been apprised of the bleeding, she would have come to the hospital sooner, around 5:30 p.m., but would not have altered the course of treatment. Importantly, this assertion was verified by the fact that even when the physician arrived at the hospital at 8:00 p.m., she did not diagnose the condition or ascertain any imminent danger to the child. Hence, this situation was factually similar to that of *Martin* because the determination that "even if the nurses were so negligent, such negligence was not the proximate cause of the terrible loss suffered" was based on the actual behavior of the physician, not speculation. *Id.* at 266.

Albain is particularly instructive with regard to its discussion regarding the necessity of expert testimony to demonstrate proximate cause. Specifically, the opinion demonstrates the interrelationship between the standard of care and proximate cause, indicating, in relevant part:

> [A]ccepted standards of nursing practice include a duty to keep the attending physician informed of a patient's condition so as to permit the physician to make a proper diagnosis of and devise a plan of treatment for the patient.
>
> This duty, and an alleged breach thereof, raise issues of proximate cause. Even assuming that a nurse breached this duty to inform the attending physician of a patient's condition, it must further be shown that such breach was the proximate cause of the patient's injury before the hospital will be held vicariously liable therefor. Thus, a plaintiff must prove that, had the nurse informed the attending physician of the patient's condition at the proper time, the physician would have altered his diagnosis or treatment and prevented the injury to the patient. The trier of fact must be provided expert testimony that the injury was more likely than not caused by the nurse's negligence. [*Id.* at 265 (citations omitted).]

In a subsequent case, *Gill v Foster*, 157 Ill 2d 304, 311; 626 NE2d 190 (1993), the Illinois Supreme Court ruled that "even assuming the nurse had breached a duty to inform the treating physician of the patient's complaint, this breach did not proximately cause the delay in the correct diagnosis of the plaintiff's condition." In *Gill*, the plaintiff was hospitalized, and surgery was conducted to correct his reflux esophagitis. Postsurgery progress notes by the physician indicated that the plaintiff complained of chest pain. The physician determined the pain to be related to the surgery and a possible muscle pull from vomiting. The plaintiff continued to complain of chest pain during his discharge, but was advised by the nurse to seek follow-up care with his family doctor. Ultimately, the plaintiff was diagnosed with a herniation of the stomach into the chest, which had occurred before his discharge from the hospital. Importantly, the condition was deemed to have occurred before the physician's progress note indicating that he had evaluated the plaintiff but did not diagnose

this condition. As such, the holding in *Gill* was contingent on the factual record, which established that the "treating physician had repeated contacts with plaintiff . . . and failed to properly diagnose the problem." *Id.* at 310.

Rampe v Community Gen Hosp of Sullivan Co, 241 AD2d 817; 660 NYS2d 206 (1997), involved a case of fetal monitoring and distress. The treating physician was apprised of changes in the fetal heart rate, but did not immediately undertake to perform a cesarean section. The court rejected the plaintiff's contention "that an additional phone call would have caused [the physician] to act with greater celerity . . . ." *Id.* at 819. However, there was neither a demonstration that the physician was not informed of the condition nor expert testimony to support that additional attempts at contact would have altered the physician's response. Consequently, the trial court determined that the nursing staff and the hospital could not be found liable because proximate cause could not be established.

The decision in *Seef v Ingalls Mem Hosp*, 311 Ill App 3d 7; 724 NE2d 115 (1999), is also factually distinguishable. In *Seef*, a pregnant woman was admitted to the hospital and placed on a fetal monitor. The treating physician came to the hospital and examined the patient. The physician watched the monitor's printout strips for approximately 15 to 20 minutes, but indicated that he did not interpret the existence of a problem. The physician retired to the doctor's lounge, while the patient remained on the monitor and under the observation of the nursing staff. The physician was awakened by a call from the nursing staff and, at that time, found abnormalities in the monitoring strips sufficient to raise concerns. On further evaluation, the physician performed an emergency cesarean section. Unfortunately, the infant was stillborn.

Once again, the physician testified that "even if he had seen the monitor strips prior to 3:05 a.m., he would not have done anything differently." *Id.* at 10. Notably, in this instance, the physician's indication that he would not have intervened sooner was not subject to an attack based on credibility because his statement

> was neither self-serving nor hypothetical. Rather, [the doctor] made an inculpatory, unequivocal statement regarding his mental state at the time of the incident. He took full blame for the baby's death by admitting that, based upon the state of his knowledge at the time, he misapprehended the seriousness of the situation. He admitted that, in hindsight, the baby should have been delivered sooner. [*Id.* at 16.]

The court further determined that the obligation of the nurses to notify a supervisor was too speculative because of the failure to first notify the treating physician and the absence of expert testimony to provide an opinion regarding what another physician might have done if the treating physician had been notified and failed to act. *Id*. at 17.

Finally, in *Suttle v Lake Forest Hosp*, 315 Ill App 3d 96; 733 NE2d 726 (2000), the court distinguished *Gill*. In *Suttle*, a factual issue was found to exist regarding what the physician would have done had he been aware of the patient's condition. Specifically, *Gill* was determined to be inapposite because

> [i]n this case there was a factual issue as to what Dr. Salter would have done had he known of the condition of the placenta. In *Gill*, there was no factual dispute concerning what the doctor would have done had he known of the plaintiff's chest pains, because in fact he did know. In the instant case, there is testimony that Dr. Salter diagnosed Diana as suffering from respiratory distress syndrome, rather than hypovolemic shock, because he was *unaware* of Ms. Suttle's velamentous insertion. It is undisputed that

> evidence which shows to a reasonable degree of certainty that negligent delay in diagnosis or treatment lessened the effectiveness of treatment is sufficient to establish proximate cause. [*Id.* at 104 (emphasis in original).]

This survey of caselaw serves to illustrate that a determination regarding the presence or absence of proximate cause is highly fact-dependent and that these determinations, by their very nature, do not lend themselves to an overly broad formulation. Because *Martin* and other such cases should be construed very narrowly, *Martin* is not applicable to the facts of this case.

B. LOST OPPORTUNITY DOCTRINE

Contrary to defendant's argument on appeal, there is no basis for this Court to review this matter as a lost opportunity case, pursuant to MCL 600.2912a(2). A review of the lower court file, particularly the complaint and affidavit of merit, shows that plaintiff pleaded only a basic negligence action and not a lost opportunity to obtain a better result. "A plaintiff's theory in a medical malpractice case must be pleaded with specificity and the proofs must be limited in accordance with the theories pleaded." *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999), citing MCR 2.111(B)(1). Further, the trial court specifically denied defendant's request and did not instruct the jury to treat this matter as a lost opportunity claim.

The lost opportunity doctrine is not applicable in this case because, as noted by our Supreme Court in *Stone v Williamson*, 482 Mich 144, 152; 753 NW2d 106 (2008), the " 'theory is potentially available in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those

injuries.' " (Citation omitted.) In this instance, as in *Stone*, "it is clear from the way the instructions were given that the jury found that the traditional elements were met: defendants' negligence more probably than not caused plaintiff's injuries. Thus, . . . the jury properly found that plaintiff had satisfied the causation and injury elements." *Id.* at 163.

On appeal, defendant raises a related issue pertaining to the trial court's permitting plaintiff's expert to testify regarding the lost opportunity doctrine, asserting that Dr. Flanigan's opinion did not meet the reliability criteria of MCL 600.2955 because he did not cite or rely on professional treatises or publications. In part, we need not address this issue because it is rendered moot by the very fact that the case did not proceed under the loss of opportunity doctrine and Dr. Flanigan's testimony was consistent with proofs to establish the elements of negligence.

MRE 702 governs the admission of expert testimony, stating:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This Court, in *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007), identified the criteria for the admission of expert testimony as including the requirements that

> (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by

> a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man. The party presenting the expert bears the burden of persuading the trial court that the expert has the necessary qualifications and specialized knowledge that will aid the fact-finder in understanding the evidence or determining a fact in issue. A witness may be qualified as an expert by knowledge, skill, experience, training, or education. [Citations omitted.]

Defendant does not dispute Dr. Flanigan's qualifications pursuant to MCL 600.2169. MCL 600.2955(3) specifically indicates that the provisions of MCL 600.2955 "are in addition to, and do not otherwise affect, the criteria for expert testimony provided in [MCL 600.2169]."

Ostensibly, by suggesting that Dr. Flanigan's opinion is not admissible under MCL 600.2955, defendant is confusing the admissibility of the testimony with the weight to be attributed to the expert's opinion. Specifically,

> when determining whether a witness is qualified as an expert, the trial court should not weigh the proffered witness's credibility. Rather, a trial court's doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility. " 'Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility.' " The extent of a witness's expertise is usually for the jury to decide. [*Surman*, *supra* at 309-310 (citations omitted).]

Hence, defendant's criticism regarding the scientific or theoretical basis for Dr. Flanigan's opinion is more properly confined to challenge during cross-examination rather than attempting to invalidate his overall qualification.

C. EVIDENTIARY ERRORS

Defendant contends the trial court erred by permitting lay witnesses to testify regarding plaintiff's integrity or character. Plaintiff responds that admission of the testimony was necessary and responsive to a surveillance video submitted into evidence by defendant, which implied that plaintiff was not truthful regarding the effect of his alleged injuries.

Specifically, MRE 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may only refer to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

At trial, defendant offered a surveillance video, without testimony or commentary, showing plaintiff engaged in certain activities. Purportedly, the video demonstrated that, contrary to plaintiff's assertions, he was capable of engaging in certain activities and was not as physically limited as alleged in his complaint. The video impliedly impugned plaintiff's truthfulness, as it suggested that plaintiff's residual injuries were not as extensive or limiting as alleged. MRE 608(a)(2) permits opinion testimony regarding a plaintiff's character for truthfulness "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence *or otherwise*." (Emphasis added.) In this instance the testimony went beyond plaintiff's reputation for truthfulness and encompassed plaintiff's overall "integrity."

Although the trial court erred by permitting this testimony, we conclude that any such error was harm-

less. "Error in the admission of evidence is not cause for reversal unless it affects a substantial right of the party opposing admission." *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 469; 624 NW2d 427 (2000); see also MRE 103(a). Notably, the issue in dispute was the extent of plaintiff's residual injuries and their effect on his functioning. Both parties had the opportunity through testimony and other evidence, such as the surveillance video, to support their arguments and contentions. Hence, there existed sufficient evidence for the jury to determine plaintiff's residual impairments irrespective of testimony regarding plaintiff's integrity. In addition, much of the testimony elicited from these witnesses was factual regarding their observations of plaintiff while volunteering at his church, which served as the background for part of the surveillance video. These witnesses were able to provide some context or explanation for the images submitted by defendant. When considered in conjunction with the instructions to the jury admonishing them to determine the credibility and weight to be afforded any witness's testimony "and the reasonableness of the testimony considered in the light of all of the evidence," any error in permitting the challenged testimony was harmless.

On cross-appeal, plaintiff challenges the trial court's grant of summary disposition in favor of Dr. Eggert. Specifically, plaintiff contends the trial court erred by dismissing the claims following its refusal to consider testimony by various members of plaintiff's family that the nursing staff had indicated that Dr. Eggert had been unresponsive to their calls and pages, in violation of the standard of care. Defendant asserts that the trial court properly excluded this testimony as inadmissible hearsay and because of the absence of any documentation or testimony indicating that the evidence would affect or

alter the opinion of plaintiff's expert regarding Dr. Eggert's breach of the standard of care.

The claims against Dr. Eggert were dismissed because of the opinion of plaintiff's expert, Dr. Flanigan, that the surgeon had not breached the applicable standard of care regarding the treatment provided. Dr. Flanigan did indicate that the only possible breach by Dr. Eggert would have been if he had not responded in a timely manner to a communication by the nursing staff. Subsequently, depositions were conducted of plaintiff's wife, son, and daughters, and they recalled comments by PACU nursing staff after the first surgery suggesting that they encountered difficulties in reaching or communicating with Dr. Eggert regarding plaintiff's condition while in the unit. Specifically, plaintiff's son recalled the nursing staff indicating they were trying to reach Dr. Eggert, but could not recall a time frame between these comments and the physician's arrival at the PACU. Plaintiff's daughters testified in a similar manner, asserting that the nursing staff indicated they were experiencing difficulty in contacting Dr. Eggert regarding control of plaintiff's pain and that on the day after the second surgery, one of the nursing staff indicated when trying to contact Dr. Eggert that she received a busy signal and had to request the operator to "break on the line for an emergency." Plaintiff's wife testified in a similar manner but reported that the comments by the nurses occurred at approximately 8:00 p.m. and that Dr. Eggert appeared in the PACU within 30 minutes of these comments. Contrary to this testimony, all the nursing staff involved and Dr. Eggert denied encountering any delay in reaching him. They specifically disavowed having to use a telephone operator to break into his phone line, and there was no commensurate documentation indicating either the need for ongoing efforts to contact or difficulty in

contacting the physician. Defendant further asserted that even if plaintiff were able to demonstrate the nursing staff encountered difficulty in contacting Dr. Eggert, there was insufficient proof regarding the amount of time involved to establish a breach of the standard of care.

MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible except as delineated within the rules of evidence. MRE 802. While the alleged statements by the nurses unquestionably comprise hearsay, plaintiff contends they were admissible pursuant to either MRE 803(1), as present sense impressions, or MRE 803(3), as statements of a then existing mental, emotional, or physical condition.

A present sense impression, defined as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is not precluded by the hearsay rule. MRE 803(1). The availability of this exception relies on the trustworthiness of the statement, which is based on the substantially contemporaneous nature of the statement with the underlying event. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). For hearsay evidence to be admissible under this exception, three criteria must be met: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Id.* at 236. Contrary to plaintiff's contention, it is not clear from the record that the alleged statements by the nursing staff were

substantially contemporaneous with the purported difficulties encountered in contacting Dr. Eggert. Specifically, the comments made on the day following the second surgery are clearly precluded because of the failure to establish temporal proximity with the alleged events. In addition, in order to establish the foundation for the admission of a hearsay statement pursuant to the present sense impression exception, other evidence corroborating the statement must be brought forth to ensure its reliability. *Id.* at 238. In this instance, there is neither documentary evidence nor verbal testimony to corroborate the alleged statements.

Plaintiff further contends that the alleged statements are alternatively admissible under MRE 803(3), which provides:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Although plaintiff contends that MRE 803(3) is applicable, he fails to cite any law or expound on his assertion. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citation omitted). Because plaintiff failed to properly address the merits of his assertion of error regarding this evidentiary provision, we consider the issue abandoned. *Id.* at 339-340.

Despite plaintiff's failure to properly present this issue for appellate consideration, we note that "the

scope of MRE 803(3) is very narrow . . . ." *UAW v Dorsey (On Remand)*, 273 Mich App 26, 38; 730 NW2d 17 (2007). Because the alleged statements do not reflect the declarants' state of mind, but merely serve to explain a past sequence of events or behavior, the statements are specifically excluded from the exception and not admissible.

D. CURATIVE INSTRUCTION

Defendant contends the trial court erred by failing to give a curative instruction regarding a misrepresentation of law by plaintiff's counsel. Specifically, defendant argues that while questioning Nurse Piatt and nursing expert Janet McCoig, plaintiff's counsel improperly implied to the jury that the nursing staff had violated statutory law by failing to document on the medication administration record (MAR) the administration of certain medications. The challenged exchange pertaining to Nurse Piatt focused on the failure to document on the MAR the administration of an epidural narcotic:

> *Q*. And what this is, is whenever you give a medication to the patient, in this case Mr. Ykimoff, you are required by law to write it down in this medication record?
>
> *A*. Yes.

Plaintiff's counsel continued to challenge both Nurse Piatt and Nurse Desmarais regarding deficiencies or inconsistencies in their charting for this patient. However, defendant did not object to the testimony until plaintiff's counsel questioned Janet McCoig and elicited the following:

> *Q*. Are nurses required to put in the MAR the medications by law?
>
> *A*. Yes, sir—

Subsequently, extended discourse occurred between counsel and the trial court, outside the presence of the jury, seeking to clarify the "law" being referenced, which plaintiff's counsel never identified or provided to the trial court. Defense counsel sought a curative instruction, pursuant to MCR 2.516(C), which the trial court denied, basing the denial, in part, on the mistaken belief that the discussion regarding the status or existence of such a law had occurred in the presence of the jury.

MCR 2.516(C) provides:

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

Properly preserved assertions of instructional error are reviewed de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). "[A] verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial." *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

The focus of questioning by plaintiff's counsel was to demonstrate negligence by the nursing staff in failing to recognize the postsurgery formation of a blood clot and to notify the surgeon in a timely manner. To this end, counsel intensely questioned the nursing staff regarding their charting of plaintiff's condition and treatments administered in an effort to demonstrate their awareness of various symptoms indicating the forma-

tion of a clot at various temporal points during plaintiff's stay in the PACU. Whether the charting deficiencies by the nurses comprised a statutory violation was irrelevant. The references to legal requirements for charting medications were cursory and constituted only a very small part of plaintiff's argument, making it unlikely that these references influenced or caused the jury's verdict against defendant. Defendant's reliance on *Shreve v Leavitt*, 51 Mich App 235; 214 NW2d 739 (1974), is misplaced. In *Shreve* the misstatement of law pertained to the issue of proximate cause and affected a crucial question confronted by the jury. *Id.* at 241. In this instance, whether failure to document or chart medication on a particular form violated a law or nursing regulation was not integral to demonstrating defendant's negligence or proximate cause.

Further, the trial court instructed the jury, "The law that you are to apply to this case is contained in these instructions and it is your duty to follow them" and that statements by the attorneys did not comprise evidence and that the jury "should disregard anything said by an attorney that is not supported by evidence . . . ." Because jurors are presumed to follow their instructions, any failure to provide a curative instruction was harmless. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

E. NONECONOMIC DAMAGES CAP

In a medical malpractice action, MCL 600.1483 controls an award of damages for noneconomic loss. Specifically, MCL 600.1483(1) provides:

> In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not

> exceed $280,000.00 unless, as a result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to [MCL 600.6304], in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (*i*) Injury to the brain.
>
> (*ii*) Injury to the spinal cord.
>
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.
>
> (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

For purposes of this case, only the trial court's determination that MCL 600.1483(1)(c) was applicable is being considered.

The trial court permitted use of the upper tier of the damages cap on the basis of plaintiff's claim that he suffered from erectile dysfunction as a result of defendant's negligence, which resulted in his "inability to procreate." Defendant contends that plaintiff's erectile dysfunction was a condition that existed before the surgery and points to the lack of medical evidence to support this claim. Resolution of this matter turns on both the statutory language of the damages cap provision and the failure of plaintiff to come forward with any medical evidence to support its application under the circumstances of this case.

The goal of statutory interpretation is to give effect to the intent of the Legislature. *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005). If

statutory language "is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Id.* (quotation marks and citations omitted.) " '[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 649; 761 NW2d 414 (2008) (citation omitted). MCL 600.1483(1)(c) requires, for application of the upper tier damages cap, that "permanent loss of or damage to a reproductive organ resulting in the inability to procreate" must have occurred. "Procreate" is defined in *Random House Webster's College Dictionary* (1997) as follows: "[as a transitive verb] 1. to beget or generate (offspring). 2. to produce; bring into being. [an intransitive verb] 3. to beget offspring." In contrast, the definition of "erectile dysfunction" is "chronic inability to achieve or maintain an erection satisfactory for sexual intercourse[.]"[5] Significantly, the definition for "erectile dysfunction" does not equate with a level of impairment sufficient to meet the statutory requirement of an "inability to procreate" for purposes of applying the higher damages cap. While the level or severity of plaintiff's condition may interfere with his ability to engage in sexual intercourse, there is no demonstration that this condition precludes his ability to "beget offspring." In addition, the statute specifically requires "permanent loss of or damage to a reproductive organ . . . ." Plaintiff does not assert damage to a reproductive organ. Rather, he asserts ischemic damage to the lumbosacral plexus nerves, affecting the pelvic area, which has allegedly resulted in the loss of sensation and inability to achieve

[5] *Merriam-Webster's Medical Dictionary*, available at Merriam-Webster OnLine <http://www.merriam-webster.com> (accessed March 20, 2009).

or maintain an erection. While the alleged injury may affect the ability to engage in sexual intercourse, by definition plaintiff's claim does not encompass the "permanent loss of or damage to a reproductive organ," as required by MCL 600.1483(1)(c).

Notably, the only testimony elicited regarding plaintiff's condition came from plaintiff and his wife. There was no definitive medical evidence that linked plaintiff's alleged condition to the surgery and also served to verify an inability to procreate. In fact, plaintiff acknowledged that he suffered from erectile dysfunction for a period of time before the surgery, albeit to a lesser degree. Although plaintiff previously consulted a physician regarding medical intervention for this condition, he ultimately declined the recommended treatments or pharmaceutical options. In addition, the presence of other preexisting medical conditions, such as high blood pressure and diabetes, and how they might have contributed to plaintiff's condition were not addressed as factors in this diagnosis. Although plaintiff's wife testified that intimate relations with her husband were affected, we find it contradictory that a claim for loss of consortium did not accompany this complaint. There is evidence that plaintiff enjoyed the ability to procreate earlier in his life, having fathered 11 children. However, no commensurate medical evidence was proffered to establish that his ability to procreate was absolutely precluded as the result of this surgery. As such, the trial court erred by using this exception in the calculation of noneconomic damages.

In addition, plaintiff has raised several additional issues on cross-appeal that depend on this Court's determination that a new trial is warranted. Because we do not find it necessary to remand this matter for a new trial, this Court need not address those remaining issues.

V. RESPONSE

I understand the divergent perspectives of my colleagues regarding the application of *Martin*, but believe it is imperative that we not unnecessarily confuse the issue in this case and that we make a concerted effort to provide as clear a rule or guidance as possible to courts facing similar issues. Although I agree with the concerns regarding the potential for oversimplification and improper application of this Court's ruling in *Martin*, I feel similarly burdened that the concurring opinions in this matter may serve to unnecessarily complicate rather than define the factors to be used by courts in making determinations in cases involving similar issues.

Specifically, I disagree with Judge GLEICHER's statement that "the credibility of the treating physician could be questioned for any reason, regardless of whether his conduct conformed with his words." *Post* at 122. Although I concur that a jury may accept or disregard testimony as the ultimate fact-finder, I do not agree that the fact-finder can ignore uncontroverted facts establishing the actual conduct or behavior of the physician. Further, I take issue with Judge GLEICHER's contention that this lead opinion has "entirely misconstrued the law" with regard to proximate cause as elucidated in *Skinner*. *Post* at 129. Judge GLEICHER asserts that in *Martin* and this case "record evidence created a question of fact regarding whether the plaintiffs sustained injury *because they did not receive timely postoperative surgery* . . . ." *Post* at 130 (emphasis in original). Merely because plaintiff's proffered expert testimony provides a possible explanation for the injury suffered is insufficient by itself to meet plaintiff's burden with regard to proximate causation. Consequently, I believe that the reasoning delineated in this

opinion is consistent with *Skinner* and that Judge GLEICHER's suggestion that we permit a jury to accept or reject as credible an expert's opinion, irrespective of a factual demonstration that a physician's "conduct conformed with his words" violates the proscriptions of *Skinner* against speculation and conjecture and does not address the issue at hand.

Finally, while I agree that the inclusion of a more extensive factual history in *Martin* would have been helpful in avoiding its potential misapplication, I disagree with the distinctions Judge GLEICHER attempts to draw between *Martin* and this case. While *Martin* referred heavily to the affidavits provided by the physicians, there did exist in *Martin* uncontroverted factual averments that the treating physician had not only reviewed the patient's chart but "was otherwise adequately apprised of developments . . . ." *Martin*, *supra* at 162. Hence, the failure of the physician in *Martin* to act, given the availability of information regarding his patient's condition, is distinguishable from the situation in this case, involving the absolute absence of such information by Dr. Eggert. Hence, Dr. Eggert's subsequent averments regarding his inaction and denial of an earlier basis for intervention comprise mere speculation and conjecture. I would emphasize that the focus in these types of cases is not merely on the predictable existence of conflicting expert opinions. Rather, it is the existence of uncontroverted facts detailing the actual behaviors of the physicians and their consistency or inconsistency with regard to the timing and receipt of information related to their patient's condition that permits a court to evaluate their subsequent averments pertaining to the effect or absence of treatment or interventions provided in determining whether a genuine issue of material fact and proximate cause are established.

VI. CONCLUSIONS

We affirm the trial court's denial of defendant's motion for a new trial or JNOV and the grant of summary disposition in favor of Dr. Eggert. We vacate that portion of the judgment pertaining to the award and remand the case to the trial court for recalculation of damages pursuant to the proper statutory provision of the medical malpractice damages cap. Pursuant to MCR 7.219(A), we conclude that neither side has sufficiently prevailed for purposes of taxation of costs. We do not retain jurisdiction.

BANDSTRA, J. (*concurring*). I concur with the lead opinion and write separately to explain my conclusion that this case is factually different from *Martin v Ledingham*, 282 Mich App 158; 774 NW2d 328 (2009), as well as my firm disagreement with the approach advocated in Judge GLEICHER's concurring opinion.

The record in this case establishes clearly that before his decision to undergo the bypass graft surgery, plaintiff was fully informed by Dr. David Eggert that the procedure was a serious matter that could well result in negative consequences no matter how carefully it was conducted. Nonetheless, plaintiff decided to take the risks necessarily attendant to the surgery and, as alleged in his complaint, he experienced postsurgical problems that have led to this lawsuit.

Of course, the mere fact of injury does not suffice to impose liability against the hospital (defendant) in this malpractice lawsuit. Instead, plaintiff must establish that his injuries "were the proximate result" of defendant's failure to comply with an appropriate standard of care. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). As part of this required "proximate cause" proof, plaintiff had to come forward with evi-

dence showing that "[a]s a matter of logic, . . . defendant's negligence was a cause in fact of . . . plaintiff's injuries . . . ." *Id*. at 87.

Much like *Martin*, this case involves the allegation that, had defendant's nurses better informed Eggert regarding plaintiff's postoperative condition, he would have taken different actions, which would have mitigated plaintiff's injuries. In *Martin*, we properly concluded that the plaintiff had failed to come forward with sufficient evidence that the nurses' alleged failure to report to the doctors was, as a matter of logic, a cause in fact of any injury to the plaintiff. To the contrary, the only evidence pertaining to that logical connection directly refuted it. The doctors unequivocally stated that even if the nurses had made the reports that the plaintiff claimed were appropriate, they would have not altered their treatment of the plaintiff in response. Notwithstanding Judge GLEICHER's complaints, *Martin* did nothing more than recognize that the plaintiff had the burden to establish a logical connection between the alleged negligence and the alleged injury. The plaintiff having failed to do so, *Martin* naturally concluded that summary disposition was warranted.

In the case before us today, evidence was presented from which a rational fact-finder could conclude that there was a logical connection between the alleged negligence and the alleged injury. As did the doctors in *Martin*, Eggert stated that had he received better and more complete reports from defendant's nurses regarding plaintiff's postoperative condition, he would not have altered his treatment in response. Nonetheless, as explained in the lead opinion, Eggert's testimony was replete with caveats and admissions from which the jury could reasonably conclude that, in fact, better and more complete reporting might well have led him to

respond more aggressively to plaintiff's problems.[1] In that sense, the burden of proving a possible logical cause-in-fact connection between the nurses' reports and plaintiff's injury was satisfied.[2]

Judge GLEICHER's opinion seems to completely absolve a plaintiff from any burden to come forward with affirmative cause-in-fact evidence in support of a malpractice claim. As I understand the argument, liability could be imposed even though all the evidence presented directly refutes a logical finding of cause in fact because that evidence is subject to disbelief by the finder of fact. In other words, as Judge GLEICHER would have it, a plaintiff could bring a case to the fact-finder without any evidence to support a logical finding of cause in fact, merely in the hope that the fact-finder would disbelieve evidence establishing that no logical cause in fact existed.

That would certainly be a novel approach inconsistent with the usual understanding of a plaintiff's burden of proof. It would also subvert the usual summary disposition rule that protects a defendant from litigation if "there is no genuine issue" on an element of a plaintiff's claim. MCR 2.116(C)(10). Even if the only available evidence undermines a plaintiff's claim, Judge

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[1] The evidence of a logical cause in fact here was certainly not strong; it merely rose minimally to a level where a genuine issue was presented for the fact-finder's determination.

[2] As in *Martin*, *supra* at 161-162, the opinion of plaintiff's expert here about what Eggert should have done had he received better reports from the nurses is irrelevant. The logical cause-in-fact element of plaintiff's claim can be satisfied only by evidence showing what Eggert would, in fact, have done had different reports been provided, without regard whatsoever to any hypothetical obligations he may have had under an applicable standard of care. Such a standard of care evidence would, of course, be relevant in a different case—if Eggert, having received better reports from the nurses, was being sued for failing to undertake a different treatment in response.

GLEICHER would still apparently find a genuine issue arising from the possibility that the fact-finder could disbelieve that evidence.

The radical approach advocated by Judge GLEICHER would be directly contrary to the long stated rule that "it is not a legitimate inference to draw from testimony denying the existence of a fact sought to be proved, that such denial is evidence that the fact exists." *Quinn v Blanck*, 55 Mich 269, 272; 21 NW 307 (1884). Judge GLEICHER selectively quotes from a number of Michigan precedents that are portrayed as being contrary to this commonsensical *Quinn* rule. However, none of those precedents allowed a plaintiff merely to rely on evidence contrary to a proposition in order to establish that proposition. Instead, each case involved factual disputes based on contradictory evidence and, unremarkably, those disputes were allowed to go to the fact-finder for determination.[3]

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[3] In *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), only "most of" the facts surrounding the execution of a bond were undisputed. The rest of the facts, apparently to be deduced from the testimony of seven people involved in the execution of the bond, "were not conceded or beyond dispute." *Id.* While the Supreme Court opined that the account of the bond's execution favoring the claimant "probably ought to have satisfied any one," it further concluded that this determination was properly in the hands of the jury considering the apparently varying evidence. *Id.* Similarly, in *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940), the Supreme Court determined that a factual question existed for jury determination when testimony by a person that he had mailed a notice, while "not directly contradicted," was inconsistent with evidence from a principal of the person's employer concerning the manner in which the notice had been sent, as well as evidence that various recipients of the notice had complaints regarding the receipt of the notice. Again, in *Arndt v Grayewski*, 279 Mich 224, 230; 271 NW 740 (1937), the Supreme Court unremarkably concluded that a factual question existed for jury determination when the testimony of an eye-witness to an accident was "disputed by the physical facts, and seriously questioned by the testimony of one of the defendants . . . ." *Morgan v Engels*, 372 Mich 514; 127 NW2d 382 (1964), involved a routine

Further, the most recent of these precedents, *Taylor v Mobley*, 279 Mich App 309, 313; 760 NW2d 234 (2008), was not a case like the present one, in which a plaintiff burdened with the responsibility to present evidence in support of a claim arguably failed to do so. The plaintiff in *Taylor* presented her own testimony in support of the contested noneconomic damages element of her claim. Accordingly, *Taylor* did not present any argument similar to the one we address here about a failure to properly shoulder a burden of proof; *Taylor* is completely inapposite.

And, finally, Judge GLEICHER's "additional concerns" with this opinion are simply unfounded. *Post* at 132. They are based on a failure to recognize that my analysis rests on the fact that our law places a burden of proof on a plaintiff seeking to recover damages. Thus, a plaintiff failing to come forward with any evidence in support of an element of a claim is properly subject to summary disposition for failing to shoulder that burden of proof. In other words, a plaintiff is penalized for failing to come forward with evidence precisely because the law imposes a burden of proof on a plaintiff.[4] That

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malpractice suit dispute between a doctor who claimed he had not violated any standard of practice and an expert witness who testified that he had. In *Strach v St John Hosp Corp*, 160 Mich App 251, 270-271; 408 NW2d 441 (1987), a factual question was presented when a doctor's testimony that he had informed the plaintiffs that he was an independent contractor was contradicted by the plaintiffs' testimony that they did not recall so being told. And, finally, in *Taylor v Mobley*, 279 Mich App 309, 313; 760 NW2d 234 (2008), our Court held that a jury could disbelieve a plaintiff's account of extreme pain and suffering where there was "countervailing evidence that undermined plaintiff's credibility," testimony that "plaintiff appeared to be only in 'a little bit of pain' immediately after" the dog bite giving rise to the action, and other contradictory evidence.

[4] Of course, this same analysis applies to any party, not just a plaintiff, who bears a burden of proof. For example, in many areas of our law, the burden of presenting proof of a defense is imposed on a defendant once a

same analysis does not apply to a party on which no burden of proof is imposed. And thus, Judge GLEICHER's conclusion that the rule requiring a plaintiff to present evidence in support of a claim means that a plaintiff who does so is entitled to summary disposition is logically unfounded.

GLEICHER, J. (*concurring*). I concur with the lead opinion that the trial court properly denied defendant W. A. Foote Memorial Hospital's motion for judgment notwithstanding the verdict or a new trial and correctly granted summary disposition to defendant Dr. David Eggert. I further agree that the higher medical malpractice damages cap in MCL 600.1483(1)(c) does not apply to the facts of this case. I write separately to express disagreement with the proposition that this case is logically distinguishable from *Martin v Ledingham*, 282 Mich App 158; 774 NW2d 328 (2009).

The lead opinion rejects the hospital's contentions that plaintiff failed to create a genuine issue of fact concerning causation, concluding that because the jury remained free to disbelieve Dr. Eggert's testimony, "the matter was properly submitted to the jury for resolution." *Ante* at 94. Judge BANDSTRA's concurring opinion posits that Dr. Eggert's testimony "was replete with caveats and admissions" that allowed the jury to determine that "better and more complete reporting might well have led" to more aggressive treatment of plaintiff's problems. *Ante* at 116. Both the lead opinion and Judge BANDSTRA's concurring opinion assert that the weaknesses inherent in Eggert's testimony completely distinguish this case from *Martin*. I respectfully

plaintiff presents a prima facie case in support of a claim. If a defendant fails to come forward with any evidence in support of a defense to the claim, the plaintiff is entitled to summary disposition.

disagree. In my view, "the jury is free to credit or discredit *any* testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001) (emphasis added). Moreover, I believe that this Court incorrectly decided *Martin*.

I. *MARTIN*'S SIMILARITY TO THIS CASE AND ITS DISREGARD OF THE JURY'S FACT-FINDING PREROGATIVE

In *Martin*, this Court confronted a factual situation strikingly similar to the instant case. The plaintiff in *Martin* asserted that the nurses breached the applicable standard of care by failing to apprise the plaintiff's surgeon of her worsening postsurgical condition. The plaintiff's surgeons submitted affidavits in support of summary disposition pursuant to MCR 2.116(C)(10), alleging "that they would not have changed the course of plaintiff's treatment had nurses employed by defendant informed them of plaintiff's condition as plaintiff alleged they should have." *Martin*, 282 Mich App at 159. The plaintiff submitted evidence "showing that, had the nurses properly reported, a notified doctor would have had the duty to change plaintiff's treatment." *Id*. at 160. In affirming summary disposition for the defendant hospital, the Court in *Martin* considered the surgeons' affidavits and ultimately rejected the notion that a fact-finder could determine that cause in fact existed "merely because the fact-finder disbelieved the doctors involved . . . ." *Id*. at 163. The Court reasoned, "This evidence was insufficient to create a genuine issue on factual causation because it only concerned what hypothetical doctors should have done had better reports been provided." *Id.* at 161-162. According to *Martin*, *id*. at 163-164, a jury's disbelief of the doctors actually involved in a plaintiff's care would result in an inherently speculative finding of causation, directly contravening

our Supreme Court's holding in *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

No meaningful distinction exists between the causation proofs presented in *Martin* and those introduced during the trial of this case. I respectfully reject the lead opinion's reasoning that "[i]n *Martin*, the credibility of the treating physician was not called into question both because he was kept apprised of his patient's condition on an ongoing basis and because his actual behavior regarding medical intervention completely coincided with his subsequent assertions." *Ante* at 94. In my view, the credibility of the treating physician could be questioned for any reason, regardless of whether his conduct conformed with his words.

In *Martin*, the surgeons' affidavits set forth *opinions* regarding (1) the extent or quantity of their knowledge regarding the plaintiff's condition ("[Dr.] Rynbrandt repeatedly stated that he had *ample* information regarding plaintiff and her situation . . . . ") and (2) the quality of their knowledge ("[H]e reviewed plaintiff's chart and was otherwise *adequately* apprised of developments . . . . "). *Martin*, 282 Mich App at 162 (emphasis added). Dr. Rynbrandt's affidavit further opined that "nothing the nurses could have done differently would have altered the care that he provided plaintiff." *Id*.

The lead opinion asserts, "The very fact-intensive nature of the ruling in *Martin* necessarily leads to concern regarding the broader applicability of that decision . . . ." *Ante* at 90. But *Martin* contains woefully few facts. The lead opinion attempts to distinguish *Martin* by emphasizing that the affiant surgeons in that case actually behaved in accordance with the words recited in their affidavits. But that is not what the case says, and I am at a loss to read facts into *Martin* that simply do not exist. Had the surgeons in *Martin* been

present at the patient's bedside when the plaintiff claimed that intervention should have occurred, I daresay their affidavits would have so reflected. Instead, the affidavits assert the same reasoning adopted by Dr. Eggert: "that they would not have changed the course of plaintiff's treatment *had nurses employed by defendant informed them of plaintiff's condition as plaintiff alleged they should have*." *Martin*, 282 Mich App at 159 (emphasis added). *Martin* neither examined nor referred to the "actual behavior" of the treating physicians. I simply find no basis in *Martin* for the lead opinion's determination that the physician's behavior in that case "completely coincided with his subsequent assertions." *Ante* at 94.

According to the lead opinion, "the physician in *Martin*, in averring that the nursing staff could not have done anything differently to affect his treatment decision, was describing his actual analysis of the presenting situation and subsequent action or inaction and was neither speculating nor relying on hindsight." *Ante* at 91. I respectfully disagree. The affidavits submitted in *Martin* embodied opinion testimony addressing the character of the affiants' knowledge and the manner in which they would have responded if the nurses had provided "better reports." *Martin*, 282 Mich App at 161-162. Rather than reporting firsthand knowledge obtained from actual observations of the plaintiff contemporaneous with the nursing observations, the affidavits recited the affiants' speculation about what they would have done under circumstances that did not actually exist. In essence, the surgeons' affidavits qualified as answers to the hypothetical question, What would you have done had the nurses behaved in the manner described by the plaintiff's nursing expert? In my view, this evidence was actually more speculative and less reliable than testimony describing the stan-

dard of care, which must conform to the rigorous requirements of MRE 702 and 703. The plaintiff's expert testimony called into question the credibility of the surgeons' affidavits by asserting that the standard of care applicable to the affiants required swifter intervention. If the jury believed the plaintiff's experts in this regard, it should then have determined whether to believe that the surgeons would have breached the standard of care.

Because the affidavits in *Martin* provided opinions rather than facts, the credibility of their signers should have been explored at a trial. It is for this central reason that I disagree with the holding in *Martin* that the affidavits supplied a *factual* basis for summary disposition. Although Judge BANDSTRA characterizes as "radical" my approach to this issue, *ante* at 118, I propose nothing new. More than a century ago, the United States Supreme Court concisely articulated the foundation for the principle that a witness's credibility always remains subject to a jury's consideration:

> The jury were the judges of the credibility of the witnesses . . . , and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function. [*Aetna Life Ins Co v Ward*, 140 US 76, 88; 11 S Ct 720; 35 L Ed 371 (1891).]

Numerous cases demonstrate that until *Martin*, Michigan's appellate courts had consistently adhered to the core principles, derived from *Aetna Life Ins Co* and similar cases,[1] that (1) every witness's testimony is subject to disbelief by the finder of fact and (2) a court may not usurp the jury's prerogative to accept or reject any testimony.

For example, in *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), our Supreme Court reversed the grant of a verdict directed by the trial court on the basis of "undisputed" evidence that "probably ought to have satisfied any one . . . ." Writing for a unanimous Court, Justice COOLEY explained that despite the absence of any conflicting evidence, the jury "may disbelieve the most positive evidence, even when it stands uncontra-

[1] The core principles underpinning the caselaw cited throughout this concurring opinion emanate from the Seventh Amendment of the United States Constitution. See also *The Conqueror*, 166 US 110, 133; 17 S Ct 510; 41 L Ed 937 (1897), stating that the "ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses," and *Head v Hargrave*, 105 US 45, 49; 26 L Ed 1028 (1881), stating:

> It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion.

dicted; and the judge cannot take from them their right of judgment." *Id*. Our Supreme Court again emphasized that a witness need not be believed in *Yonkus v McKay*, 186 Mich 203, 210-211; 152 NW 1031 (1915), stating:

> To hold that in all cases when a witness swears to a certain fact the court must instruct the jury to accept that statement as proven, would be to establish a dangerous rule. Witnesses sometimes are mistaken and sometimes unfortunately are wilfully mendacious. The administration of justice does not require the establishment of a rule which compels the jury to accept as absolute verity every uncontradicted statement a witness may make.

In *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940), the Supreme Court again acknowledged that "[u]ncontradicted testimony may be disentitled to conclusiveness because, from lapse of time or other circumstances, it may be inferred that the memory of the witness is imperfect as to the facts to which he testified, or that he recollects what he professes to have forgotten." *Id*. See also *Arndt v Grayewski*, 279 Mich 224, 231; 271 NW 740 (1937), holding that eyewitness testimony "is not conclusive upon the court or a jury if the facts and circumstances of the case are such as irresistibly lead the mind to a different conclusion."

Citing *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948), this Court held in *Strach v St John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987), that a jury could disregard a physician's unrebutted testimony, reasoning that "a jury may disbelieve the most positive evidence even when it stands uncontradicted, and the judge cannot take from them their right of judgment[.]" More recently, in *Taylor v Mobley*, 279 Mich App 309, 314; 760 NW2d 234 (2008), this Court held that the jury justifiably rejected the plaintiff's

uncontradicted and unchallenged testimony regarding her personal pain and suffering after a dog bite. This Court observed that "the jury could have simply disbelieved and discredited plaintiff's testimony regarding pain and suffering." *Id*. The Court referred in a footnote to several additional cases standing for the proposition that "the jurors' prerogative to disbelieve testimony, including uncontroverted testimony, is well established." *Id*. at 314 n 5.

These cases underscore that despite Dr. Eggert's emphatic, unrebutted assertion that he would not have operated on plaintiff at 7:00 p.m. irrespective of what he may have learned from the nurses, the jury possessed the authority to disbelieve every word that Dr. Eggert uttered. The lead opinion asserts that Dr. Eggert's testimony was "speculative at best and self-serving at worst" and thus could be disregarded. *Ante* at 91. But in my view, these characterizations qualify as wholly irrelevant to the requisite focus of the analysis here. The caselaw discussed earlier posits that the jury can disregard testimony that, in the words of Justice COOLEY, "probably ought to have satisfied any one . . . ." *Woodin*, 46 Mich at 427. Regardless of whether this Court views the testimony of a treating physician as entirely rational and in accord with the medical records, or completely self-serving and verging on the absurd, a judge cannot remove from a jury its "right of judgment." *Strach*, 160 Mich App at 271. From the time of *Woodin*, through that of *Kelly*, the governing principle in Michigan has been that a jury possesses the freedom to disregard a witness's opinions for any reason, or for no discernible reason. That a jury has exercised this right does not render its proximate cause decision "speculative." Rather, the correct inquiry is whether sufficient record evidence demonstrates that the defendant's negligence was "a cause of plaintiff's injury, and . . . that

the plaintiff's injury . . . [was] a natural and probable result of the negligent conduct." M Civ JI 15.01.[2]

II. IMPROPER FACT-FINDING BY THE *MARTIN* COURT IN THE CONTEXT OF SUMMARY DISPOSITION

This Court's decision in *Martin* contravenes another accepted jurisprudential rule. "It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 365; 480 NW2d 275 (1991); see also *Arbelius v Poletti*, 188 Mich App 14, 18-19; 469 NW2d 436 (1991). However, in *Martin* this Court accepted as true the treating physicians' averments describing what they would have done had they received the reports by the nurses that the plaintiff alleged should have been made. The Court rejected the notion that record evidence, including the testimony of the plaintiff's expert witness that the additional reports would have shown the physicians that a different course of treatment was appropriate, sufficed to challenge the veracity of the treating physicians' contentions. Despite the apparent absence of any evidence rebutting the testimony of the plaintiff's expert, the Court in *Martin* found as fact that the treating physicians would not have changed the treatment if they had received additional reports. *Martin*, *supra* at 161-163.

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[2] A trial court retains the authority to grant summary disposition if a medical malpractice plaintiff fails to present evidence documenting what a reasonable physician would have done under the same or similar circumstances or that an alternative course of conduct would likely have altered the plaintiff's outcome. Additionally, a trial court may analyze the evidence under MCR 2.611(A)(1)(e) to determine whether the "great weight of the evidence" supports the jury's proximate cause finding.

I believe that in light of *SSC Assoc Ltd Partnership* and a related line of established caselaw, this conclusion constitutes legal error and supplies a second ground warranting reconsideration of *Martin*.

III. CAUSATION IN *MARTIN* AND THIS CASE

But the most troubling aspect of both *Martin* and this case concerns the meaning of proximate causation and the proper application of our Supreme Court's opinion in *Skinner*. A brief review of *Skinner* reveals that the lead opinion, Judge BANDSTRA's concurring opinion, and *Martin* have entirely misconstrued the law.

At the time of his death, the decedent in *Skinner* had been operating an electric metal "tumbling machine" of his own design and manufacture. *Skinner*, 445 Mich at 157. The plaintiffs theorized that defendant Square D Company defectively designed a switch that the decedent had incorporated in his tumbling machine. According to the plaintiffs, the "large 'phantom zone' " of the switch sometimes inaccurately signaled that the switch was "off" while power actually continued flowing to the machine. *Id*. at 158. Because no one witnessed the decedent's accident, no direct evidence existed demonstrating any relationship between the switch and the decedent's electrocution. The plaintiffs' case against Square D was entirely circumstantial, predicated on a mere assumption that the Square D switch had played a role in the decedent's death. *Id*. at 163. Furthermore, some of the physical evidence directly contradicted the hypothetical accident scenario proposed by the plaintiffs. *Id*. at 171-172. Square D maintained that even assuming the presence of a defect in its switch, the plaintiffs' circumstantial proofs failed to demonstrate that the decedent "was misled by the switch when he was fatally electrocuted." *Id*. at 158. The Supreme Court agreed, concluding that the record contained no

direct or circumstantial evidence from which a reasonable jury could infer the mechanism of the decedent's electrocution or whether the switch contributed to the accident. *Id*. at 174. The Supreme Court emphasized in *Skinner* that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 164.

Skinner simply has no applicability here or to the situation presented in *Martin*. In both this case and *Martin*, record evidence created a question of fact regarding whether the plaintiffs sustained injury *because they did not receive timely postoperative surgery*; expert testimony in both cases demonstrated that "but for" the absence of timely surgical intervention, the plaintiffs would not have sustained injury. Unlike *Skinner*, in which no direct or circumstantial evidence connected the defect in the switch and the decedent's electrocution, admissible expert opinions in *Martin* and the instant case directly linked the plaintiffs' injuries to a delay in their second operations. And breaches of the nursing standard of care constituted a cause of that delay, according to the plaintiffs' evidence.

The plaintiffs' expert physicians here and in *Martin* thus supported the "but for" causation requirement with their testimony that if the plaintiffs had undergone earlier second surgeries, they would have recovered uneventfully. And most critically, the experts further opined that had the treating physicians been informed of their patients' worsening conditions, the standard of care would have required prompt second operations. A firm factual foundation supported the expert testimony supplied in both cases, providing admissible evidence from which a jury could conclude that a reasonably prudent physician would have taken the patients back to the operating room, thereby pre-

venting injury. While the plaintiffs in *Skinner* entirely lacked evidence that the switch constituted a cause in fact of the decedent's electrocution, the plaintiffs here and in *Martin* produced evidence that the nurses' negligence resulted in patient injury. This evidence established cause in fact. See also *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004):

> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.
>
> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while " '[t]he evidence need not negate all other possible causes,' " this Court has consistently required that the evidence " 'exclude other reasonable hypotheses with a fair amount of certainty.' " [Citations omitted.]

Here and in *Martin*, the plaintiffs presented evidence that supported " 'a reasonable inference of a logical sequence of cause and effect.' " *Id.* at 87 (citation omitted). On the basis of that evidence, a jury could reasonably infer that nursing negligence constituted a cause in fact of the plaintiffs' injuries. *It is reasonable to further infer that a doctor informed of the patient's serious postoperative problems will conform his or her conduct to the applicable standard of care*. Speculation and conjecture play no part in the creation of this inference. The expert opinions, premised on actual

medical records and provided in accordance with MRE 702 and 703, afford a reasonable basis for a jury's conclusion that the nurses' negligence was "a cause of plaintiff's injury, and . . . that the plaintiff's injury . . . [was] a natural and probable result of the negligent conduct." M Civ JI 15.01. In summary, unlike the plaintiffs in *Skinner*, who lacked any factual support for their expert's opinion connecting the switch and the mechanism of the decedent's death, the medical malpractice plaintiffs here and in *Martin* introduced evidence from which the jury could reasonably infer that earlier surgery, performed in accordance with the standard of care, would have prevented injury.[3]

IV. ADDITIONAL CONCERNS WITH JUDGE BANDSTRA'S APPROACH

Judge BANDSTRA's opinion asserts that the "logical cause-in-fact element of plaintiff's claim can be satisfied only by evidence showing what Eggert would, in fact, have done had different reports been provided, without regard whatsoever to any hypothetical obligations he may have had under an applicable standard of care." *Ante* at 117 n 2. But suppose that Dr. Eggert had testified that if the nurses had notified him of changes in plaintiff's condition, he would have immediately taken plaintiff to the operating room. According to Judge BANDSTRA's concurring opinion and *Martin*, Dr. Eggert's testimony would necessarily have resulted in summary disposition *for plaintiff* with regard to proximate causation. This result would fly in the face of the overriding rule that a jury may elect to disbelieve Dr. Eggert and reject his testimony for any reason, including that it seems either self-serving or likely false.

[3] It bears emphasis that an expert witness's testimony may not be admitted unless the "facts or data in the particular case upon which an expert bases an opinion or inference [are] in evidence." MRE 703.

Alternatively, suppose that Dr. Eggert had remained a codefendant in the instant medical malpractice case. Under Judge BANDSTRA's reasoning, if Dr. Eggert had testified that he would not have operated until 8:40 p.m. notwithstanding what the nurses told him, this testimony would automatically have relieved the nurses of any liability for their negligence.

With all due respect, Judge BANDSTRA's analysis is plainly incorrect, not only because the jury has the authority to disbelieve Dr. Eggert, but also because the physician's negligence would constitute merely an intervening cause of the plaintiff's injury. This Court has soundly rejected the notion that intervening negligence eliminates proximate causation by an initial tortfeasor:

> An act of negligence does not cease to be a proximate cause of the injury because of an intervening act of negligence, if the prior negligence is still operating and the injury is not different in kind from that which would have resulted from the prior act. The courts of this state have held that whether an intervening negligent act of a third person constitutes a superseding proximate cause is a question for the jury. An intervening cause is not an absolute bar to liability if the intervening event is foreseeable, though negligent or even criminal. [*Taylor v Wyeth Laboratories, Inc*, 139 Mich App 389, 401-402; 362 NW2d 293 (1984) (citations omitted).]

"Consequences of a doctor's negligent acts in treating the plaintiff's original injury are considered foreseeable. Hence, whether the doctor's intervening negligent act constitutes a superseding proximate cause is a question for the jury." *Richards v Pierce*, 162 Mich App 308, 317; 412 NW2d 725 (1987) (citation omitted).

Judge BANDSTRA would hold, as this Court did in *Martin*, that a trial court *must* accept a physician's hypothetical description of what he would have done had he known the actual facts, even if this testimony is

soundly rebutted by competent evidence establishing that in so doing, the physician would have violated the standard of care. Such an approach elevates rank speculation over expert medical opinion. In an analogous setting involving informed consent, the United States Court of Appeals for the District of Columbia explained the reasons that courts should soundly reject this subjective standard of proof:

> In our view, this method of dealing with the issue on causation comes in second-best. *It places the physician in jeopardy of the patient's hindsight and bitterness. It places the factfinder in the position of deciding whether a speculative answer to a hypothetical question is to be credited. It calls for a subjective determination solely on testimony of a patient-witness shadowed by the occurrence of the undisclosed risk*. [*Canterbury v Spence*, 150 US App DC 263, 281-282; 464 F2d 772 (1972) (emphasis added; citations omitted).]

A physician's expressed opinion concerning his hypothetical conduct under different circumstances should face objective testing by a jury. Although a physician's testimony regarding causation is a relevant consideration, neither logic nor law dictates that it should always control the outcome of the causation issue.

V. CONCLUSION

The central proximate cause question in both this case and *Martin* is whether the patient would have benefited from timely nursing reports to the attending surgeon. A jury soundly rejected Dr. Eggert's contention that he would have ignored earlier information signaling a vascular catastrophe. In a different case, a jury might fully credit a physician's comparable testimony and reject that the physician probably would have adhered to the standard of care described by the plain-

tiff's expert. Resolution of this question resides solely with the jury. In summary, with the caveats expressed in this opinion, I concur in the lead opinion's affirmance of the trial court's denial of the hospital's motion for judgment notwithstanding the verdict or a new trial, the grant of summary disposition to Dr. Eggert, and the remand for a recalculation of damages.

PEOPLE v SPANGLER

Docket No. 288632. Submitted May 5, 2009, at Lansing. Decided July 21, 2009, at 9:00 a.m.

Darrin W. Spangler, charged in the Ingham Circuit Court with first-degree criminal sexual conduct, second-degree criminal sexual conduct, and gross indecency between males, moved in limine for the exclusion of statements the four-year-old complainant had made to a sexual assault nurse examiner (SANE) at a hospital. The court, James R. Giddings, J., granted the motion. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. The Confrontation Clause of the Sixth Amendment bars out-of-court statements that are testimonial in nature unless the declarant is unavailable to testify but the defendant had a prior opportunity to cross-examine the declarant.

2. Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.

3. In order to determine whether a sexual abuse victim's statements to a SANE are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and determine whether the circumstances would lead an objective person to reasonably believe that the statements will be used in a later prosecution or objectively indicate that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather that to meet an ongoing emergency. In making its decision, the court may, among other things, consider (1) the reason for the victim's presentation to the SANE, e.g., to be checked for injuries or for signs of abuse; (2) the length of time between the abuse and the presentation; (3) what, if any, preliminary questions were asked of the victim or the victim's representative, or what preliminary conversations took

place, before the official interview or examination; (4) where the interview or examination took place, e.g., a hospital emergency room, another location in the hospital, or an off-site location; (5) the manner in which the interview or examination was conducted; (6) whether the SANE conducted a medical examination and, if so, the extent of the examination and whether the SANE provided or recommended any medical treatment; (7) whether the SANE took photographs or collected any other evidence; (8) whether the victim's statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made; (9) whether the SANE completed a forensic form during or after the interview or examination; (10) whether the victim or the victim's representative signed release or authorization forms, or was privy to any portion of the forensic form, before or during the interview or examination; (11) whether individuals other than the victim and the SANE were involved in the interview and, if so, the level of their involvement; (12) if and when law enforcement became involved in the case, how they became involved and the level of their involvement; and (13) how SANEs are used by the particular hospital or facility where the interview or examination took place.

4. The record in this case thus far is inadequate for a proper decision by the trial court on the question whether any or all the complainant's statements to the SANE during the medical forensic examination were testimonial and barred by the Confrontation Clause. The case must be remanded for a fuller development of the record and for a reconsideration of the motion in limine.

Order vacated and case remanded for further proceedings.

CONSTITUTIONAL LAW — RIGHT OF CONFRONTATION — EVIDENCE — HEARSAY — SEXUAL ABUSE VICTIMS — SEXUAL ASSAULT NURSE EXAMINERS.

Statements by a sexual abuse victim to a sexual assault nurse examiner are testimonial and barred by the Confrontation Clause if the totality of the circumstances objectively indicate that the statements will be used in a later criminal prosecution or that the primary purpose of the sexual assault nurse examiner's questioning was to establish past events potentially relevant to a later criminal prosecution rather than to meet an ongoing emergency (US Const, Am VI).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, and *Jonathan C. Roth*, Assistant Prosecuting Attorney, for the people.

Thomas Rasmusson for the defendant.

Before: K. F. KELLY, P.J., and CAVANAGH and BECKERING, JJ.

PER CURIAM. The prosecution appeals by leave granted the trial court's October 28, 2008, order granting defendant's motion in limine to exclude statements the complainant made to a sexual assault nurse examiner (SANE) during a medical forensic examination. At issue is whether the complainant's statements were testimonial hearsay and thus barred by the Confrontation Clause of the Sixth Amendment, US Const, Am VI. We vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant has been charged with first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (anal-penile penetration of a person under 13 years of age), second-degree CSC, MCL 750.520c(2)(b) (sexual contact with a person under 13 years of age and the defendant is 17 years of age or older), and gross indecency between males, MCL 750.338. The complainant, a young boy, was four years of age at the time of the alleged abuse.

The record in this case consists of (1) arguments of counsel in a 14-minute motion in limine hearing; (2) a Michigan State Police original incident report (incident report); and (3) a "Michigan Medical Forensic Examination Record" (forensic form). According to the incident report, the complainant's mother said that the complainant started to "hump her and make grunting noises while doing so." After receiving further information from the complainant, she contacted the family's physician. The record is silent about what

information was relayed to the doctor. The doctor recommended that she take the complainant to Sparrow Hospital to be "checked for injuries." The complainant was immediately taken to the hospital.

At Sparrow Hospital, the complainant's mother signed a permission form authorizing a SANE to perform a medical forensic examination and take medical forensic photographs. Jane Schneider, a SANE, conducted a medical forensic examination of the complainant and completed the forensic form. There is no information in the record reflecting what occurred during the intake process at the hospital, who the mother and the complainant spoke with, or how a SANE came to be assigned to the case. In fact, there is no evidence on the record of the particular process the hospital employed regarding the examination of the complainant. The record is also silent on how the hospital uses the services of SANEs, what their training or certification consists of, or their relationship with local law enforcement. It is clear, however, that at some point in time while the complainant was at the hospital, Schneider filled out the forensic form. On the form, Schneider recorded statements the victim made:

> "Bear hurt it. He put his pee pee in my butt. It hurt. He turned the movie off and took my pop away. I touched his pee pee with my hand. He had me squish it. Water came out, yellow water. He said his pee pee is too dangerous. Let's call Bear. I want to tell him no. They babysit us."

There is no information regarding when this form was filled out or when, how, or in what context the complainant made the statements. Leisa Fuller, from Child Family Services (Angel House), was present during the examination, but it is unknown how or why she was present or what, if any, role she played in the examination.

The police were contacted and arrived at the hospital before the complainant and his mother left. It was at this point that the mother indicated that she wanted to press charges against defendant. Ultimately, defendant was arrested and gave an oral and a written confession.

Before trial, defendant moved to preclude statements the complainant made to Schneider, simply relying on the forensic form itself and arguing:

> [*Defense Counsel*]: This report itself establishes my argument that it is the functional equivalent of testimony. It is for the purpose of ginning up a case. Notice that the heading—you'll notice that the heading for [the forensic form], it says Forensic Nurse Examiner Program and then here is the release that follows and the release is to perform a medical forensic examination. Next line, to take the medical forensic photographs and that release is signed by the mother and by Ms. Schneider. Then we look at the next page—
>
> [*The Court*]: So it's not for any treatment purpose?
>
> [*Defense Counsel*]: —it says it's a forensic report is what it says . . . . So we think this was purely the functional equivalent of testimony and it should be excluded under Crawford.

The prosecution argued that because the statements were made to a nurse for the purpose of obtaining medical treatment, they were nontestimonial. The trial court made no attempt to gain any information regarding the process of the examination, what prompted the complainant's statements, or how the forensic form was filled out. Rather, it simply granted the motion to preclude any testimony from the nurse solely on the basis of the format of the forensic form:

> I'm going to grant the motion in limine to foreclose this testimony. This very statement right here is from Davis and Washington. I don't believe that this statement prepared in this case in any way falls—well this is indeed

testimonial as described by the United States Supreme Court Justice Scalia's opinion. It says right here, I mean right in the beginning we've X'd it out, consent not to collect medical [forensic specimens].

Michigan Medical Forensic Examination Record history of assault, multiple assailants, there are boxes, weapons used, location of assault, physical assessment, forensics specimen collection, treatment provided and so on and so forth.

* * *

—I'm looking—I'm kind of flipping through the whole thing. This doesn't have—this has nothing whatsoever to do with any treatment. It has nothing whatsoever to do with any emergency. Curiously enough, the Court of Appeals cited a statement [in *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 274005)], but then made a ruling which does not seem to be consistent with the statement out of Davis and Washington, a more recent quoting. Statements are non testimonial when made in the course of a police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Testimony when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to . . . the prosecution. I mean I'm not aware—I mean that's the whole purpose of this examination and I don't know that the outcome can possibly depend on how reliable in terms of age, mental status or anything else (undecipherable). I mean that is not the focus of Davis and Washington, although the panel seems to have gleaned something in that regard.

Here this is a classic, if there is such a thing as a classic example of testimonial—of a statement that is testimonial or a series of statements of testimonial nature, that's this one here. So I'm going to grant the motion.

This Court granted the prosecution's application for leave to appeal.[1]

II. APPLICABLE LAW

The prosecution argues that the trial court erred by excluding the complainant's statements to Schneider during the medical forensic examination. According to the prosecution, the statements were nontestimonial and not subject to the Confrontation Clause. Generally, we review a trial court's decision to admit or exclude evidence for abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). But we review preliminary issues of law, such as admissibility of evidence based on construction of a constitutional provision, de novo. *Id*.

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. In *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars out-of-court statements that are testimonial in nature unless the declarant is unavailable to testify but the defendant had a prior opportunity to cross-examine the declarant. In that case, an eyewitness to a stabbing described the stabbing to the police during a custodial interrogation later the same night. *Id*. at 38. The Court determined that the eyewitness's statements during the interrogation were testimonial, *id*. at 61, 68, describing testimonial statements as follows:

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[1] *People v Spangler*, unpublished order of the Court of Appeals, entered December 29, 2008 (Docket No. 288632).

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" . . . . These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. [*Id*. at 51-52 (citations omitted).]

In *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006) the Court further defined the distinction between nontestimonial and testimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In that case, the Court held that a recording of the initial portion of a conversation between a domestic abuse victim and a 911 operator was nontestimonial. *Id*. at 829. The Court noted that although 911 operators

are not law enforcement officers, they may at least be agents of law enforcement when conducting interrogations of 911 callers. *Id*. at 823 n 2. Thus, for purposes of that opinion, the Court considered the acts of the 911 operator to be the acts of the police. *Id*. The Court further noted, however, that "the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id*. at 827. It found that unlike the eyewitness in *Crawford*, the victim in *Davis* was "speaking about events *as they were actually happening*"; she was "facing an ongoing emergency"; her 911 call was "plainly a call for help against a bona fide physical threat"; her "elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past"; and her "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." *Id*. (emphasis in original). The Court concluded that the circumstances of the interrogation "objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. [The victim] simply was not acting as a *witness*; she was not testifying. What she said was not 'a weaker substitute for live testimony' at trial." *Id*. at 828 (emphasis in original).

In regard to the later portion of the conversation between the victim and the 911 operator, the Court held:

> This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," once that purpose has been achieved. In this case, for example, after the operator

> gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told [the victim] to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, [the victim's] statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*. . . . [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial . . . . [*Id*. at 828-829 (citations omitted).]

B

Courts of this state have not yet determined whether a sexual abuse victim's statements to a SANE may be subject to the Confrontation Clause. In *People v Geno*, 261 Mich App 624, 625; 683 NW2d 687 (2004), the parent of a two-year-old sexual abuse victim telephoned Child Protective Services, which then arranged for an assessment and interview of the child at the Children's Assessment Center. During the interview, the child indicated that the defendant had hurt her vaginal area. *Id*. This Court, in an opinion that followed *Crawford* but predated *Davis*, concluded:

> [T]he child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. The child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question whether she had an "owie" was not a statement in the nature of " '*ex parte* in-court testimony or its functional equivalent . . . .' " *Crawford*, *supra* [at 51]. [*Geno*, *supra* at 631.]

Although the Court noted that the executive director of the Children's Assessment Center was not a govern-

ment employee, it did not determine whether the director acted as an agent of law enforcement during the assessment and interview of the child. Furthermore, although the Court determined that the child's statement was not in the nature of "*ex parte* in-court testimony or its functional equivalent," it did not specifically determine whether the statement fell under any of the other formulations of testimonial statements listed in *Crawford*, such as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, *supra* at 52 (quotation marks and citation omitted).

In *People v Walker (On Remand)*, 273 Mich App 56, 59-60; 728 NW2d 902 (2006), the victim of an alleged felonious assault escaped from her own house and went to the house of a neighbor, who telephoned 911. This Court, in an opinion issued after *Davis*, held that the neighbor's 911 call was a call for help and that the information elicited was "necessary to resolve the present emergency [the victim's son was still in the home], rather than learn what had happened in the past . . . ." *Id*. at 63. These statements were therefore nontestimonial. *Id*. at 59. After the police arrived at the scene, however, the victim made additional statements, at least some of which were recorded by the neighbor. *Id*. at 60, 64-65. The Court held that the victim's oral statements to the police and those recorded by the neighbor were "generally testimonial" under *Davis*. *Id*. at 65. It found that although "portions of these statements could be viewed as necessary for the police to assess the present emergency," the primary purpose of the police questioning was investigatory, there was no indication of a continuing danger, and the statements "recounted how [the] potentially criminal past events began and progressed." *Id*. at 65. The Court

did not specifically determine whether the neighbor acted as an agent of law enforcement, focusing instead on the purpose of the police officers' questions, the status of the emergency, and the nature of the victim's statements.

More recently, in *People v Bryant*, 483 Mich 132; 768 NW2d 65 (2009), our Supreme Court held that a shooting victim's statements to the police "constituted inadmissible testimonial hearsay within the meaning of the United States Supreme Court's decisions in *Crawford* [*supra*] and *Davis* [*supra*]" because the " 'primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution.' " *Bryant*, *supra* at 134-135, quoting *Davis*, *supra* at 822. In *Bryant*, five police officers found the victim lying on the ground at a gas station. *Id*. at 135-136. "The victim had a gunshot wound in his abdomen and appeared to be in considerable pain." *Id*. at 136. The officers asked the victim "what had happened, who had shot him, and where the shooting had occurred." *Id*. at 143. The victim stated that the defendant had shot him approximately 30 minutes earlier at the defendant's house, "which was about six blocks away, and that he drove himself to the gas station." *Id*. At the time of his statements, the victim was aware "that emergency medical service (EMS) was on the way." *Id*. at 144. After summarizing the United States Supreme Court's decisions in *Crawford* and *Davis*, our Supreme Court held that the victim's statements were testimonial in nature, stating, in part:

> The circumstances [of the victim's statements], in our judgment, clearly indicate that the "primary purpose" of the questioning was to establish the facts of an event that had *already* occurred; the "primary purpose" was not to enable police assistance to meet an ongoing emergency. The crime had been completed about 30 minutes earlier and six

> blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, the "primary purpose" of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator.
>
> *Davis* stated that "in the final analysis [it is] the declarant's statements, not the interrogation's questions, that the Confrontation Clause requires us to evaluate. The declarant here (i.e., the victim) made these statements while he was surrounded by five police officers and knowing that emergency medical services (EMS) was on the way. Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency of the type identified by the United States Supreme Court, but was instead to tell people who had committed the crime against him, where the crime had been committed, and where the police could find the criminal. That is, the primary purpose of the victim's statements to the police was to "establish or prove past events potentially relevant to later criminal prosecution."
>
> Further, the officers' actions do not suggest that the officers themselves considered the circumstances at the gas station to constitute an "ongoing emergency," at least not as the Supreme Court defines that term . . . .
>
> The primary purpose of the police questioning of the victim at the gas station was to determine who shot the victim and where the shooter could be found so that they could arrest him. [*Id*. at 143-146 (citations omitted).]

C

A majority of state courts that have considered this issue have determined that statements by a sexual abuse victim to a SANE, or similar examiner, were testimonial in nature and barred by the Confrontation Clause. In *State v Ortega*, 143 NM 261, 262; 175 P3d 929 (2007), the court held that a child victim's statements during a

SANE examination were testimonial. The court noted that "*Crawford* jurisprudence" focuses on the " 'purpose' of the interview or interrogation in which a statement is taken." *Id*. at 265. Addressing the purpose of a SANE examination, the court stated:

> Dr. Gagan [the medical director of the SANE program] characterized the SANE examination as a "forensic evaluation that has medical examination features to it, and if it's appropriate, to determine which forensic evidence needs to be recorded or collected." Ballentine's Law Dictionary defines "forensic" as "pertaining to or belonging to the courts." Ballentine's Law Dictionary 488 (3d ed. 1969). Specifically, Dr. Gagan described a forensic medical examination as different from a medical examination in both the type of information sought and the method used in seeking it. Its primary purpose is to evaluate and record possible injuries, record any injuries found, work with law enforcement and child services agencies, and determine if the child is in a safe environment. We think the district court fairly characterized the SANE exam as a "forensic exam with medical features." The United States Department of Justices's description of SANE program operations states that
>
> "[t]he SANE or other medical personnel (e.g., emergency department physicians or nurses) first assess the victim's need for emergency medical care and ensure that serious injuries are treated. After the victim's medical condition is stabilized or it is determined that immediate medical care is not required, the SANE can begin the evidentiary examination."
>
> Sexual Assault Nurse Examiner (SANE) Programs, http://www.ncjrs.gov/App/Publications/alphaList.aspx?alpha=S. While SANE personnel might treat medical conditions requiring immediate attention for a victim's safety, "further evaluation and care of serious trauma is referred to a designated medical facility or physician." *Id*. Any medications provided the victim by SANE personnel are "prophylactic . . . for the prevention of sexually transmitted diseases . . . and other care needed as a result of the crime." *Id*. Clearly, the SANE examination is one geared for the

preparation, collection, evaluation and disposition of evidence, and all medical treatment provided is relative to the patient being a victim of a sexual crime. We believe that this purpose exists in concert with the very things that might make a statement obtained thereby "testimonial" . . . .

While we have recognized that statements identifying a perpetrator may be important to subsequent psychological treatment and may be evidence on which a medical professional might rely in providing such treatment, . . . that is not our current situation, as a SANE is not in the business of providing ongoing treatment. We also recognize that the statements may have had a medical purpose, but that does not preclude statements from also being testimonial. . . .

* * *

The statements given by Child and recorded by Nurse Lopez [the nurse who conducted the examination] described nothing but Defendants assaulting her by rubbing parts of her body, and demanding that she rub parts of theirs. She described times and places where and when this happened, and stated that Defendants had told her not to tell her mother because they did not want to get in "big trouble." She stated that her mother found out because of "black hair on [her] underwear." Under a report form heading of "Other Pertinent History," nothing appears. No other parts of the report are germane to medical diagnosis or treatment. No "evidence of findings or trauma" to Child's body were noted and no medications were prescribed. The report notes anal contact with Child with a finger and Child's anus was examined by Nurse Lopez for evidence of abuse, but the report discloses no other penetration or contact. Nurse Lopez's narrative impression was that Child had provided a "clear history of sexual abuse" and described it. Nurse Lopez noted physical findings relative to the described sexual contact, but made no other medical findings, diagnoses, prognoses, or recommendations. The discharge recommendation was merely "[f]ollow up with support services as needed." The report was then forwarded to Officer Lewandowski.

> While a SANE evaluation does not emphasize obtaining a detailed victim statement concerning the events and circumstances of abuse . . . , the purpose of the SANE examination is geared toward obtaining the victim's verbal account of abuse to then begin looking for physical manifestations that confirm or confound the account, thereby obtaining forensic evidence to be used in court. In this case, this is all that occurred. Obtaining statements that might be relevant to medical treatment is a significant step short of obtaining statements for the purpose of *engaging* in medical treatment. [*Ortega*, *supra* at 265-267.]

The court concluded that because the primary purpose of the SANE examination was "to prove some past fact for use in a criminal trial rather than to meet an ongoing emergency," the child victim's statements during the examination were testimonial. *Id*. at 269.

Similarly, in *Medina v State*, 122 Nev 346, 349, 352-353; 143 P3d 471 (2006), the court held that a rape victim's statements to a SANE during a sexual assault examination were testimonial. The court concluded that the SANE was "a police operative" in that she was a "forensics nurse" who, according to her own testimony, gathered "evidence for the prosecution for possible use in later prosecutions," and that the circumstances of the examination "would lead an objective witness to reasonably believe that the statements would be available for use at a later trial." *Id*. at 354-355. *United States v Gardinier*, 65 MJ 60 (CA Armed Forces, 2007) involved statements by a child who was a victim of sexual abuse to a SANE during a sexual assault examination at the Children's Advocacy Center. *Id*. at 65-66. The SANE completed a form entitled "Forensic Medical Examination Form," which contained a "Treatments" section where the SANE recommended follow-up care at the hospital. *Id*. at 66. The examination was conducted at the behest of law enforcement,

and the consent form for the examination stated that the form would be provided to law enforcement. *Id*. The court determined, under the totality of the circumstances, that the child's "statements were elicited in response to law enforcement inquiry with the primary purpose of producing evidence with an eye toward trial." *Id*. Likewise, in *State v Cannon*, 254 SW3d 287, 305 (Tenn, 2008), the court held that the sexual assault victim's statements during a SANE examination "were testimonial as the primary purpose of these statements was to establish or prove past events potentially relevant to later criminal prosecution." (Quotation marks and citation omitted.) It was the policy of both the hospital and the police to subject sexual assault victims to SANE examinations. *Id*. In *Cannon*, a detective questioned the victim along with the SANE and there was no ongoing emergency. *Id*. The SANE described her interaction with the victim as an "investigation" and "forensics examination"; she had been trained to question victims of sexual assault, which included instruction from the police and the prosecutor on collection of evidence and questions to ask; and she often testified regarding her findings. *Id*.

Several state courts have determined that statements by sexual abuse victims to examiners similar to SANEs were testimonial. See, e.g., *In re Rolandis G*, 232 Ill 2d 13, 32; 902 NE2d 600 (2008) (a victim's statements to a child advocate who was part of an "interdisciplinary, coordinated systems approach to the investigation of child sexual abuse" were testimonial where a police officer observed the interview, a videotape of the interview was turned over to the police, and the objective circumstances of the interview indicated that its primary purpose was "to gather information and establish past acts for future prosecution"); *State v Hooper*, 145 Idaho 139, 145; 176 P3d 911 (2007) (a

victim's statements to a forensic interviewer at the Sexual Trauma Abuse Response Center were testimonial where the victim was advised that the police were watching the interview, the police determined some of the questions asked, the questions covered details not pertinent to medical concerns, a videotape of the interview and other evidence were turned over to the police, and "the interview was geared toward gathering evidence rather than providing medical treatment"); *People v Stechly*, 225 Ill 2d 246, 300; 870 NE2d 333 (2007) (a victim's statements to a clinical specialist with the hospital's child abuse team were testimonial where the victim's mother brought him to the hospital emergency room, the specialist twice interviewed the victim, the primary purpose of both interviews was to gather information for an investigation and possible prosecution, and the specialist was a "mandated reporter" legally required to report child sexual abuse); *Hernandez v State*, 946 So 2d 1270, 1271 (Fla App, 2007) (a victim's statements to a "Child Protection Team" nurse were testimonial where the forensic examination was conducted at law enforcement's behest, a statute required the nurse to perform medical and forensic examinations and serve as a witness at trial, a primary purpose of the examination was to gather information for potential criminal prosecution, and there was no ongoing emergency). But see *Seely v State*, 373 Ark 141; 282 SW3d 778 (2008) (a victim's statements to a social worker whose duties included interviewing children brought to the hospital for physical or sexual abuse were not testimonial where the parent brought the child to the hospital, the police did not request or participate in the interview, and the social worker's primary purpose was to assess the victim's safety and need for medical treatment).

D

We hold, in accordance with the United States Supreme Court's description of testimonial statements in *Crawford* and *Davis*, the reasoning of the courts of this state in *Walker* and *Bryant*, and the decisions of numerous state courts analyzing this issue, that in order to determine whether a sexual abuse victim's statements to a SANE are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency.

Under *Crawford*, testimonial statements include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, *supra* at 52 (quotation marks and citation omitted). The *Davis* Court similarly held that statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, *supra* at 822. The Court further held that "a conversation which begins as an interrogation to determine the need for emergency assistance [may] . . . 'evolve into testimonial statements,' once that purpose has been achieved. . . . [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial . . . ." *Id*.

at 828-829; see also *Walker*, *supra* at 59-60, 65 (holding that although the victim's initial statements were nontestimonial, the victim's later statements to the police and her neighbor were testimonial because the primary purpose of the questioning was investigatory, there was no indication of a continuing danger, and the statements "recounted how [the] potentially criminal past events began and progressed").

As described earlier, courts of other states have considered the totality of the circumstances of a sexual abuse victim's statements to a SANE or similar examiner in determining whether the statements were testimonial. Some of the facts considered were: (1) the reason for the victim's presentation to the SANE, e.g., to be checked for injuries or for signs of abuse; (2) the length of time between the abuse and the presentation; (3) what, if any, preliminary questions were asked of the victim or the victim's representative, or what preliminary conversations took place, before the official interview or examination; (4) where the interview or examination took place, e.g., a hospital emergency room, another location in the hospital, or an off-site location; (5) the manner in which the interview or examination was conducted; (6) whether the SANE conducted a medical examination and, if so, the extent of the examination and whether the SANE provided or recommended any medical treatment; (7) whether the SANE took photographs or collected any other evidence; (8) whether the victim's statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made; (9) whether the SANE completed a forensic form during or after the interview or examination; (10) whether the victim or the victim's representative signed release or authorization forms, or was privy to any portion of the forensic form, before or

during the interview or examination; (11) whether individuals other than the victim and the SANE were involved in the interview or examination and, if so, the level of their involvement; (12) if and when law enforcement became involved in the case, how they became involved, and the level of their involvement; and (13) how SANEs are used by the particular hospital or facility where the interview or examination took place. This list of factual indicia is helpful to trial courts in making an admissibility determination under the Confrontation Clause, although it is by no means an exhaustive list.

III. INADEQUATE RECORD

In this case, the trial court erred by making its admissibility determination solely on the basis of the forensic form completed by Schneider, and by failing to consider whether the circumstances of the complainant's statements, viewed objectively and in their totality, indicated that the statements were testimonial. Nor is the record sufficiently developed to make a proper determination. See *People v Kreiner*, 415 Mich 372, 379; 329 NW2d 716 (1982) (holding that because the record in the case had not been developed sufficiently to determine whether a child's statement was admissible under the "tender years" exception, a new trial was warranted). The record is limited to the arguments of counsel at the 14-minute hearing on defendant's motion in limine, as well as the forensic form and the incident report, the admissibility of which is questionable. Defendant's motion was not accompanied by, and the trial court did not require, any evidence pertaining to numerous relevant facts, including, but not limited to: what, if any, questions were asked of the complainant and his mother before the medical forensic exami-

nation; what, if any, conversations took place before the examination; when the complainant's mother signed the authorization and release forms, and if any other information was provided to her at that time; how Schneider was assigned to the case; the manner in which the examination was conducted; the particular questions Schneider asked of the complainant during the examination; at what point during the examination the complainant's statements were made; whether any individuals other than Schneider, the complainant, and his mother were present during the examination, and, if so, the level of their involvement; when and by whom was law enforcement contacted; and how SANEs are used at Sparrow Hospital.

On remand, the trial court must develop the record, making factual findings based on properly admitted evidence, before deciding defendant's motion in limine. In determining whether any or all of the complainant's statements to Schneider during the medical forensic examination were testimonial and thus barred by the Confrontation Clause, the trial court must consider the totality of the circumstances of the complainant's statements and determine whether the circumstances would lead an objective witness to reasonably believe that the statements would be available for use in a later prosecution or objectively indicated that the primary purpose of Schneider's questions or the examination was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency.

Order vacated and case remanded for further proceedings. We do not retain jurisdiction.

In re HANSEN

Docket No. 289903. Submitted June 2, 2009, at Lansing. Decided July 21, 2009, at 9:05 a.m.

The Department of Human Services petitioned the Manistee Circuit Court, Family Division, for the termination of Billy Joe Hansen's parental rights to Genevieve B. Hansen. The court, James M. Batzer, J., granted the petition on the basis of two statutory grounds, one of which, MCL 712A.19b(3)(h), was that the respondent is imprisoned for more than two years, has not provided for the child's proper care and custody, and there is no reasonable expectation that the respondent will be able to do so within a reasonable time considering the child's age. The respondent appealed.

The Court of Appeals *held*:

1. Under MCL 712A.19b(5), as amended by 2008 PA 199, effective July 11, 2008, a termination of parental rights may occur only if the court finds a statutory ground for termination and finds that the termination of parental rights is in the child's best interests. If the court so finds, termination is mandatory. In this case, the circuit court erred by applying a preamendment best-interests test that called for termination if there were grounds for termination unless the court found that termination was clearly not in the child's best interests.

2. The circuit court's error does not require reversal. Under MCR 2.613(A), a trial court's error in issuing a ruling or order, or an error in the proceedings, is not grounds for the Court of Appeals to reverse or otherwise disturb the judgment or order, unless the Court of Appeals believes that failure to do so would be inconsistent with substantial justice. Substantial justice is served by affirming the decision of the circuit court in this case. Although the circuit court did not affirmatively find that termination of the respondent's parental rights would be in the child's best interests, the record is replete with evidence that would justify that finding: the respondent has never had custody of the child; the child has been in the custody of her paternal aunt and uncle for all her life, save the first 15 days; no bond exists between the child and the respondent; the aunt and uncle wish to adopt the child and give

her permanence; there was evidence that termination would be in the child's best interests; and if termination were not ordered, the child could be returned to the respondent no earlier than the date of his earliest possible release from prison, when the child would be 13 years old. The child needs and deserves the permanency that termination of the respondent's parental rights and her subsequent adoption can give her.

Affirmed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — STATUTORY GROUNDS FOR TERMINATION — CHILDREN'S BEST INTERESTS.

A court may terminate parental rights only after finding a statutory ground for termination and finding that the termination of parental rights is in the child's best interests (MCL 712A.19b[5], as amended by 2008 PA 199).

Ford K. Stone, Prosecuting Attorney, and *Colin B. MacBeth*, Assistant Prosecuting Attorney, for the Department of Human Services.

John R. Brakora for Billy Joe Hansen.

Before: OWENS, P.J., and SERVITTO and GLEICHER, JJ.

OWENS, P.J. Respondent father, Billy Joe Hansen, appeals as of right the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*) and (h). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Genevieve Hansen was born October 18, 2007, to Amber Teschler and respondent. Genevieve was Amber's seventh child. At the time of Genevieve's birth, Amber had previously lost custody, either temporarily or permanently, of her other six children. At the time of Genevieve's birth, respondent was Genevieve's putative father. He established paternity during the trial court proceedings.

Fifteen days after Genevieve's birth, Amber was arrested on drug charges. Respondent was unable to

care for Genevieve following her mother's arrest because he had been arrested three months earlier and was in jail awaiting trial on a number of felony traffic charges. Consequently, Amber suggested that Genevieve be placed with respondent's sister and brother-in-law, Kelly and Paul Woroniak, with whom she remains to this day.

Respondent subsequently pleaded guilty to two counts of operating a motor vehicle while intoxicated, thereby causing death, and was sentenced on June 12, 2008, to two consecutive terms of 7 to 15 years of imprisonment, with 309 days' credit. He remained in prison throughout these proceedings. His earliest release date is August 7, 2021, when Genevieve will be 13 years of age.

The initial petition seeking court jurisdiction of Genevieve and requesting termination of her mother's parental rights was submitted to the court on November 5, 2007. On December 12, 2007, petitioner, the Department of Human Services, withdrew the initial request for termination of the mother's parental rights and the mother entered a plea of admission to parts of the petition. A case plan was put into effect at the dispositional hearing on January 9, 2008. After some initial progress, Amber left the county, went to Mt. Clemens, Michigan, for a short period, and then moved to Ohio. Amber subsequently provided no verification of compliance with the case service plan and from June 12, 2008, until the termination hearing on December 16, 2008, had no contact with Genevieve. Following the termination hearing on December 16, 2008, the trial court terminated the parental rights of both parents. Amber has not appealed the termination of her parental rights.

Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(*i*) (conditions that led to

the adjudication continue to exist and there is no reasonable likelihood they will be rectified in a reasonable time considering the child's age) and (h) (the parent is imprisoned for more than two years, has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to do so within a reasonable time considering the child's age). On appeal, respondent challenges the termination of his parental rights only under MCL 712A.19b(3)(h). He does not challenge the termination of his parental rights under MCL 712A.19b(3)(c)(*i*).

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). The trial court's decision to terminate parental rights is reviewed for clear error. MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 355-357; 612 NW2d 407 (2000); *In re Sours Minors*, *supra* at 632-633. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re Miller* 433 Mich 331, 337; 445 NW2d 161 (1989). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Miller*, *supra* at 337.

Although not challenged on appeal, the termination of respondent's parental rights was proper under MCL 712A.19b(3)(c)(*i*) because the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that they will be rectified within a reasonable time. At the time of adjudication, respondent was imprisoned and could not care for Genevieve

while Amber was in jail, thus necessitating court involvement to provide for Genevieve's care and custody. At the time of the termination hearing, over 12 years remained of respondent's minimum sentence. Because of his lengthy prison sentence, respondent will not be able to provide proper care and custody for his child within a reasonable time. Thus, the termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*) was proper.

The termination of respondent's parental rights was also proper under MCL 712A.19b(3)(h). Genevieve will be deprived of a normal home with respondent for a period far exceeding two years, because respondent's earliest release date is not until 2021, when Genevieve will be 13 years old. Also, respondent has not provided for her proper care and custody, nor is there any reasonable expectation that he will be able to do so within a reasonable time considering her tender age.[1]

Respondent does not contest the length of his future incarceration, but challenges termination under this ground on the basis that he provided proper care and custody of his child while he was incarcerated. The record does not support this assertion. Respondent was incarcerated on August 6, 2007, two months before Genevieve's birth. Because respondent has remained incarcerated, he has never directly provided care for the child. Moreover, the record does not support respondent's assertion that he provided proper care by facilitating the child's placement with his sister before the court's involvement. The petitioner, at Amber's suggestion, placed

[1] Even if termination were not proper under MCL 712A.19b(3)(h), we would find that a statutory ground had been proven because respondent did not contest the termination of his parental rights under MCL 712A.19b(3)(c)(*i*) on appeal. Only one statutory ground needs to be proven in order to terminate parental rights. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991).

Genevieve with respondent's sister and brother-in-law after Amber was arrested on drug charges. Other than the minimal financial support respondent provided his sister, there is no evidence that he has provided for the child's proper care and custody.

Finally, in the course of arguing that termination is not mandatory, even if a statutory ground for termination were proven, respondent briefly argues that the trial court erred by noting that no evidence had been offered that termination was contrary to the child's best interests rather than by affirmatively finding that termination was in the child's best interests, as required by MCL 712A.19b(5), as amended by 2008 PA 199, effective July 11, 2008. We agree that the trial court applied the wrong standard with regard to the best-interests issue.

Before July 11, 2008, MCL 712A.19b(5) read as follows:

> If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

Interpreting that statute, we held in *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005), that when no party presents best-interests evidence, "[n]either the statute nor the court rule requires the court to make specific findings on the question of best interests, although trial courts usually do." However, that holding does not apply to any termination on or after July 11, 2008, because the Legislature amended subsection 5 to require an affirmative finding that termination of parental rights is in the child's best interests before the court may terminate parental rights. Therefore, under

the prior statute, the court was required to terminate parental rights once a statutory ground for termination was established by clear and convincing evidence, unless the court found that termination of parental rights was clearly not in the child's best interests. The lack of a finding that termination of parental rights would clearly not be in the child's best interests permitted (and required) termination once a statutory ground had been proven.

Since July 11, 2008, termination of parental rights may occur only if the court finds a statutory ground for termination *and* finds that the termination of parental rights is in the child's best interests. If the court so finds, termination is mandatory and not permissive ("[T]he court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b[5].). In the case of Genevieve Hansen, instead of applying the current statutory standard, the court stated that "there's been no showing made here today that it is contrary to the best interest of Genevieve Hansen and that Mr. Bill Hansen's rights should not be terminated. The record is silent to that."

While the court clearly erred in applying the wrong best-interests test, we conclude that the court's error does not require reversal under the facts of this case. First, respondent did not properly preserve the best-interests determination for appellate review by timely objection in the trial court, nor did he raise the issue in the statement of questions presented in his brief. "As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Furthermore, an issue is not preserved for appeal if it is not raised in

the appellant's statement of questions presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990); *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996). Respondent's statement of questions presented cites only the issue: "Was the termination of the parental rights of respondent, Billy Joe Hansen, proper, given that a relative placement was in place to provide for the proper care and custody of the minor child?" Notwithstanding respondent's failure to preserve and properly raise this issue, we elect to decide it. Although not properly set forth in the statement of questions presented, we will review an issue of law for which the record is factually sufficient. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003).

We find the error to be harmless. MCR 2.613(A) provides that a trial court's error in issuing a ruling or order, or an error in the proceedings, is not grounds for this Court to reverse or otherwise disturb the judgment or order, unless this Court believes that failure to do so would be inconsistent with substantial justice. In this case, we believe substantial justice is served by affirming the decision of the circuit court. Although the court did not affirmatively find that termination of respondent's parental rights would be in the child's best interests, the record is replete with evidence that would justify that finding, had the court applied the correct standard. Respondent has never had custody of the child; the child has been in the custody of her paternal aunt and uncle for all of her life, save the first 15 days; while there were a few in-jail visits when the child was very young, no bond exists between the child and respondent; the aunt and uncle wish to adopt the child and give her permanence; and, although there was no evidence offered in the termination hearing that termination of respondent's rights would be contrary to the

child's best interests, there was evidence admitted that termination would be in the child's best interests. Finally, if termination were not ordered, the child could be returned to respondent at age 13 at the soonest and, if he is not released at his earliest release date, the child could well be an adult before he is released. To live in limbo, wondering when she may be taken from the only family she has ever known and be placed with respondent when he is released, would be a substantial injustice to the child. She needs and deserves the permanency that termination of her parents' rights and her subsequent adoption can give her.

Affirmed.

TMW ENTERPRISES INC v DEPARTMENT OF TREASURY

Docket No. 284446. Submitted June 2, 2009, at Lansing. Decided July 28, 2009, at 9:00 a.m.

TMW Enterprises Inc., a subchapter S corporation, brought an action in the Court of Claims against the Department of Treasury, seeking a refund of single business tax, interest, and a negligence penalty fee that the plaintiff paid under protest when the defendant determined that the plaintiff's gain from a sale of an asset was subject to taxation under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., and did not qualify for a casual transaction exclusion under MCL 208.4(1). The Court of Claims, Paula J. M. Manderfield, J., determined that § 3(3) of the SBTA, MCL 208.3(3), was ambiguous and concluded that an S corporation is not a corporation within the meaning of the term "corporation," as used in § 3(3), and that an S corporation therefore could qualify for a casual transaction exclusion. The defendant appealed the judgment awarding the plaintiff a refund of the tax, interest, and penalty fee paid, plus statutory interest.

The Court of Appeals *held*:

1. S corporations are corporations within the plain and unambiguous meaning of the SBTA and, as a result, are not entitled to the casual transaction exclusion.

2. An S corporation is a corporation within the plain meaning of § 3(3). If an entity is a corporation, then its business income, under § 3(3), is its federal taxable income and it is not entitled to exclude casual transactions from its tax base because that exclusion applies only where a person's or partnership's business income is computed by looking to "business activity," not "federal taxable income."

Reversed in part and remanded for a new hearing.

TAXATION — SINGLE BUSINESS TAX ACT — CORPORATIONS — S CORPORATIONS — CASUAL TRANSACTIONS EXCLUSION.

All corporations, including subchapter S corporations, must determine their business incomes for purposes of the Single Business

Tax Act by looking to their "federal taxable income" and are not entitled to exclude "casual transactions" from their tax bases (MCL 208.3[3], 208.4[1]).

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas* and *Angela Emlet-Dardas*) for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for the defendant.

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. In this tax dispute, we must decide whether a subchapter S corporation[1] is a "corporation" within the meaning of MCL 208.3(3), § 3(3) of the Single Business Tax Act (SBTA), MCL 208.1 *et seq*. The Court of Claims ruled that § 3(3) is ambiguous and concluded that an S corporation is not a corporation within the meaning of § 3(3). We disagree, reverse in part, and remand for further proceedings. We hold that § 3(3) of the SBTA is clear and unambiguous and that the term "corporation" as used in that subsection includes S corporations.

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff is a subchapter S corporation headquartered in Delaware with its principal office located in Rochester Hills, Michigan. Beginning in the 1980s, plaintiff, then known as Electro Wire Products, Inc., was engaged in the business of designing, manufacturing, and assembling electrical distribution systems for automotive,

[1] Section 1361 of the Internal Revenue Code defines an S corporation as a "small business corporation . . . ." See 26 USC 1361(a)(1).

truck, and industrial applications. Plaintiff's design and manufacturing facilities were located in Michigan and its assembly facilities were located throughout the United States and Mexico. Plaintiff's primary, and nearly exclusive, automotive customer was the Ford Motor Company. Because plaintiff was and is engaged in business in Michigan, it is subject to the SBTA.

In the early 1990s, plaintiff sought to expand its operations and considered becoming a publicly held entity as opposed to a privately held company. Ford, however, discouraged plaintiff's plans and encouraged plaintiff to sell its assets to plaintiff's competitor, Alcoa Fujikura, Ltd. Subsequently, plaintiff sold all its manufacturing assets to Alcoa on July 1, 1995, including plaintiff's name, "Electro Wire Products, Inc." Plaintiff accepted a lump sum payment at the time of sale, realizing a gain of $237,059,325. The sales contract also provided that plaintiff would receive certain payments contingent upon performance levels in 1995 and 1996. These levels were never met and, as a result, plaintiff never received the payments.

After the sale, plaintiff became known as "TMW Enterprises Inc." and ceased any designing, manufacturing, or assembly activities. However, because Alcoa did not purchase the properties upon which plaintiff's facilities were located, plaintiff remained as an entity solely for the purpose of managing that real estate. Eventually, plaintiff also became engaged in the business of management consulting.

Subsequently, defendant decided to audit plaintiff's single business tax returns during the tax years beginning January 1, 1993, and ending December 31, 1995. Plaintiff filed a single business tax return for each of these years. For the 1995 tax year, plaintiff did not include the $237,059,325 gain from the asset sale be-

cause plaintiff believed that it should be excluded as a "casual transaction" under § 4(1) of the SBTA, MCL 208.4(1).[2] Defendant, however, disagreed that the gain from the asset sale should be excluded. Rather, defendant determined that plaintiff should have included the gain from the asset sale in its 1995 tax base because plaintiff did not qualify for the casual transaction exclusion. As a result, defendant assessed plaintiff a single business tax in the total amount of $1,064,612.19, including interest and a negligence penalty fee. Plaintiff paid this amount under protest.

Plaintiff then filed suit in the Court of Claims, seeking a refund of the amount paid, plus statutory interest. Plaintiff's complaint alleged that the asset sale should not be included in the tax base because it was a casual transaction; that because plaintiff is an S corporation, as opposed to a "corporation" within the meaning of § 3(3) of the SBTA, MCL 208.3(3), it should be allowed to exclude the casual transaction from its tax base; and that defendant unlawfully assessed a negligence penalty.

The matter proceeded to a bench trial, after which the parties submitted posttrial briefs. Defendant argued that because plaintiff is an S corporation, it was not entitled to claim the casual transaction exclusion because all corporations are precluded from claiming this exclusion pursuant to the unambiguous language of the SBTA. Plaintiff countered that S corporations, like itself, are permitted to claim the exclusion.

The Court of Claims agreed with plaintiff and, relying heavily on the statute's legislative history and related amendments of federal law, found that the statute was ambiguous. It stated:

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[2] Plaintiff did include this gain in its federal taxable income.

> [I]t is unclear if an S-Corporation is entitled to claim the casual transaction exemption. On one hand MCL 208.3(3) explicitly states that "business income" means federal taxable income for corporations, and that only persons other than corporations look to business activity to calculate their business income for SBT [single business tax] purposes. On the other hand, S-corporations, like partnerships, have no federal taxable income, making a calculation of business income based solely on federal taxable income for S-corporations nonsensical.

In the court's view, to read § 3(3) to mean that S corporations calculate their "business income" on the basis of federal taxable income would result in S corporations avoiding all SBT liability. The court concluded that "only C-corporations [are] to calculate their business income based only on federal taxable income [whereas] S-corporations and other non-corporate entities are to calculate their business income based on business activity." As a result, S corporations, the court determined, "are entitled to claim the casual transaction exclusion." The court then determined that plaintiff's one-time asset sale constituted a casual transaction and that the negligence penalty was unlawful. The court awarded plaintiff a refund plus any overpaid interest.[3] This appeal followed.

II. STANDARDS OF REVIEW

Because the question presented on appeal is one of statutory construction, our review of the lower court's conclusions of law is de novo. *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 43; 706 NW2d 460 (2005).

[3] After the court issued its opinion, plaintiff moved for reconsideration because the court failed to include statutory interest on the amount wrongfully collected, as requested in plaintiff's original complaint. See MCL 205.30. The court granted the motion and awarded plaintiff the statutory interest.

When interpreting a statute, our primary goal is to discern and give effect to the Legislature's intent. *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 223; 668 NW2d 181 (2003). The first step to determining the Legislature's intent is the language used. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). "The Legislature is presumed to have intended the meaning it plainly expressed." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). In looking to the language, we "must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). If the statute does not define a term, we will give it its plain and ordinary meaning, *Inter Coop Council*, *supra* at 223, and we may consult dictionary definitions, *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 43; 761 NW2d 269 (2008). If the language is plain and unambiguous, then judicial construction is neither necessary nor permitted. *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 277; 621 NW2d 233 (2000). A provision is ambiguous if it is susceptible to more than a single meaning or if it irreconcilably conflicts with another provision. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007). Further, because a tax exemption statute is not at issue, we construe the SBTA against the government. *Manske v Dep't of Treasury*, 265 Mich App 455, 458; 695 NW2d 92 (2005).

III. SBTA

On appeal, defendant argues that S corporations are corporations within the plain and unambiguous mean-

ing of the SBTA and as a result are not entitled to the casual transaction exclusion. We agree. Because an understanding of the relevant tax law will inform our decision, we first discuss the purpose and applicability of the SBTA.

A. APPLICABLE LAW

The purpose of the SBTA[4] is to impose a tax upon the privilege of conducting business in Michigan. *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 686; 741 NW2d 579 (2007). The SBT "is a business activity tax that was enacted 'to provide for the imposition, levy, computation, collection, assessment and enforcement . . . of taxes on certain commercial, business, and financial activities . . . .' 1975 PA 228." *Fluor Enterprises, Inc*, *supra* at 174. As this Court has acknowledged, this tax is not identical to an income tax, although its effect on the economy is the same. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 199; 699 NW2d 707 (2005). Rather, the SBT is a type of value added tax (VAT). *Id*. at 198. The difference between the two is that a value added tax, like the SBT, is a tax on economic activity, whereas an income tax is a tax on what has been received from the economy. *Id*. at 199. Any person engaged in business activity in Michigan is subject to the SBTA. MCL 208.31.

The starting point for calculating tax liability under the SBTA is determining a person's "tax base." This is because the SBTA imposes a "specific tax upon the adjusted tax base of every person with business activity

[4] The SBTA was repealed in 2006. 2006 PA 325. As of December 31, 2007, persons engaging in business activities in Michigan are no long subject to SBT liability. *Id*. The Legislature's purpose in repealing the SBTA was to create an environment more conducive to "job creation and investment." MCL 208.151(b).

in [Michigan]" at a specified rate determined by the statute. MCL 208.31(1).[5] "For ease of administration . . . the SBTA uses the federal income tax system as a reference and starting point and . . . converts [a person's] federal tax base into a consumption-type VAT base." *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 497; 373 NW2d 730 (1985). Accordingly, § 9 defines "tax base" to mean

> business income, before apportionment or allocation as provided in chapter 3, *even if zero or negative*, subject to the adjustments in this section. [MCL 208.9(1) (emphasis added).]

And, in turn, "business income" is defined by § 3(3) and means

> *federal taxable income*, except that for a person *other than a corporation* it means that part of *federal taxable income* derived from *business activity*. For a partnership, business income includes payments and items of income and expense which are attributable to business activity of the partnership and separately reported to the partners. [MCL 208.3(3) (emphasis added).]

Thus, if a person is a corporation, its business income is its federal taxable income, which in turn is also its tax base. However, if a person is not a corporation, then its business income is determined by looking to "that part of federal taxable income derived from business activity." MCL 208.3(3). Further, § 3(3) goes on to specify that a partnership's business income is based solely on its business activity. The SBTA defines "business activity" as

> a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or

[5] For the years at issue up to October 1, 1994, the SBTA imposed a 2.35 percent rate. MCL 208.31(1)(a). After September 30, 1994, the rate was 2.30 percent. MCL 208.31(1)(b).

> the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage . . . *but shall not include . . . a casual transaction*. [MCL 208.3(2) (emphasis added).]

Accordingly, a person "other than a corporation" and a partnership are entitled to exclude "casual transaction[s]"[6] from their tax bases because the computation of their business incomes does not include, by definition, casual transactions. MCL 208.3(3); MCL 208.3(2); see also *Manske*, *supra* at 461-462 (concluding that the plaintiff, a partnership, properly excluded a "casual transaction" from its tax base). Conversely, and as this Court has already acknowledged, a corporation is not entitled to the casual transaction exclusion because its business income is determined by its "federal taxable income" and not by its "business activity." MCL 208.3(3); *Guardian Photo, Inc*, *supra* at 279-280.

B. ANALYSIS

As noted, the fundamental disagreement in the present dispute is the meaning of the term "corporation" as used in § 3(3) of the SBTA. Our resolution of this matter turns on the statutory language of § 3(3). As previously stated, this provision provides that "business income" means

> *federal taxable income*, except that for a person *other than a corporation* it means *that part of federal taxable income*

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[6] The SBTA defines "casual transaction" as follows:

> "Casual transaction" means a transaction made or engaged in other than in the ordinary course of repeated and successive transactions of a like character, except that a transaction made or engaged in by a person that is incidental to that person's regular business activity is a business activity within the meaning of this act. [MCL 208.4(1).]

> *derived from business activity*. For a partnership, business income includes payments and items of income and expense which are attributable to business activity of the partnership and separately reported to the partners. [MCL 208.3(3) (emphasis added).]

At the outset, we note that the SBTA does not specifically define the word "corporation." When a statute does not define a word, we may consult dictionary definitions. *Alvan Motor Freight, Inc*, *supra* at 43. Corporation is broadly defined as "[a]n entity . . . having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; [or] a group or succession of persons established in accordance with legal rules into a legal . . . person that has legal personality distinct from the natural persons who make it up . . . ." Black's Law Dictionary (8th ed). Notably, this definition makes no distinction between different types of corporate entities. Equally significant is the Legislature's explicit choice not to differentiate between different kinds of corporations; rather, the Legislature simply used the word "corporation." Given the Legislature's choice not to parse or to further define the term, it is self-evident that the term "corporation," as used in § 3(3), encompasses all types of corporations. Further, the term "corporation" is not susceptible to more than one meaning, nor does it create an irreconcilable conflict with another provision. See *Fluor Enterprises, Inc*, *supra* at 177 n 3. Accordingly, we hold that an S corporation is a corporation within the plain meaning of § 3(3). It follows that if an entity is a "corporation," like plaintiff, then its business income is its federal taxable income, however that number may be calculated, and it is not entitled to exclude casual transactions from its tax base. MCL 208.3(2); MCL 208.3(3); see also *Guardian Photo, Inc*, *supra* at 279-280. Because the provision

is plain and unambiguous, the Court of Claims erred by finding otherwise and impermissibly engaging in judicial construction.[7] See *id.* at 277.

On appeal, however, plaintiff posits that § 3(3) is ambiguous. According to plaintiff, this provision became ambiguous after the United States Congress amended federal tax law so that S corporations no longer have any federal taxable income at the entity level. However, when the language of a provision is clear, reliance on the statute's legislative history and related laws is not permitted. *Oneida Charter Twp v Grand Ledge*, 282 Mich App 435, 445 n 7; 766 NW2d 291 (2009). Such histories cannot alter a statute's plain meaning. *Id*. Accordingly, it is our opinion that the Legislature's silence with regard to this change in federal law and its potential ramifications under the SBTA plays no role in the proper interpretation of an unambiguous provision.

Further, there is no merit to plaintiff's argument that because it has no federal taxable income at the federal level, the Legislature must have intended that its business income be computed by looking to its "business activity." Plaintiff essentially repeats the

[7] The Court of Claims' reasoning failed to recognize that while the application of certain language to a given set of facts may be difficult, this does not make the words themselves ambiguous. *Oneida Charter Twp v Grand Ledge*, 282 Mich App 435, 445 n 6; 766 NW2d 291 (2009). In the Court of Claims' view, the term "corporation" could encompass all corporations or the term could exclude S corporations because it would be "nonsensical" to require S corporations to calculate their business income on the basis of federal taxable income because they have no federal taxable income. The Court of Claims' former construction of § 3(3) adheres to the plain language of the statute, while the latter interpretation demonstrates the difficulty of applying that unambiguous language to the facts presented. Difficulty in applying plain language to a certain set of facts does not create a legitimate ground for engaging in judicial construction. *Id*.

argument it posited before the Court of Claims: that it would be "nonsensical" to read the statute as requiring S corporations to determine their business income by looking to their federal taxable income because it would result in plaintiff and S corporations avoiding all SBT liability since S corporations have no federal taxable income. It is true that S corporations have no federal taxable income at the federal level, as the parties concede. However, whether an S corporation has "federal taxable income" at the federal level is irrelevant because the plain language of the statute controls. As we have stated, the Legislature's intent is clear: If an entity is a "corporation" under § 3(3), its "business income" is calculated by reference to its "federal taxable income," however that number is computed, and it is not entitled to exclude casual transactions. See MCL 208.3(2); MCL 208.3(3).

Lastly, plaintiff argues that because defendant's written guidance and SBT return instructions instruct S corporations to calculate their business income on the basis of federal income deriving from business activities, just like partnerships, S corporations should not be considered corporations under § 3(3). This argument is also unavailing. Defendant's written guidance and SBT return instructions are not promulgated rules and do not carry the force of law. See *Faircloth v Family Independence Agency*, 232 Mich App 391, 403; 591 NW2d 314 (1998). And, in the absence of any ambiguity, they have no bearing on our interpretation of § 3(3). Additionally, we are not bound by an agency's interpretation of a statute, see *id*. at 406, nor are we of the opinion that our interpretation conflicts with the manner in which defendant has calculated plaintiff's "federal taxable income."

In light of our conclusion that all corporations under the plain language of § 3(3) of the SBTA must determine their business incomes by looking to their "federal taxable income," it is unnecessary for us to address the arguments raised regarding whether the asset sale constituted a "casual transaction" because a "corporation" is precluded from claiming the "casual transaction" exclusion. See *Guardian Photo, Inc*, *supra* at 279-280.

IV. NEGLIGENCE PENALTY

Defendant next contends that the Court of Claims erred by determining that the negligence penalty was unlawful and by ordering a refund of the penalty amount. The Court of Claims' ruling in this regard was based largely upon its conclusion that because § 3(3) is ambiguous, plaintiff could not have been negligent when it claimed the casual transaction exclusion. However, because we have determined that § 3(3) is clear and unambiguous and plaintiff is ineligible for the casual transaction exclusion, the court's ruling regarding the negligence penalty was legally erroneous. Accordingly, we reverse the court's findings and conclusion with respect to the negligence penalty and remand for a new hearing.[8]

V. CONCLUSION

Plaintiff has sought to compel this Court to correct

[8] We note that on appeal plaintiff argues that defendant should be deemed to have admitted that the penalty was unlawful because defendant failed to answer the relevant portion of plaintiff's complaint. See MCR 2.111(E). Defendant, on appeal, has relied upon stipulated exhibits, presumably presented before the Court of Claims, but not contained in the record before us, to argue that plaintiff was negligent and no reasonable cause existed to justify a waiver of the penalty. Because we are vacating the court's decision, we need not address these arguments, as they are more properly first addressed before the Court of Claims.

what plaintiff perceives to be the Legislature's oversight in failing to modify § 3(3) when federal tax law was amended. This would require this Court to read the term "corporation" to mean "C corporations" as the Court of Claims did. But we will not read additional requirements into a clear and unambiguous statute that are not within the Legislature's manifest intent. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007). The language of § 3(3) is plain and unambiguous: All corporations, including S corporations, determine their business income by looking to their "federal taxable income," however that number may be computed. The Court of Claims' contrary conclusion is inapposite to our judicial role. It is not for the courts to debate the wisdom or policy behind the SBTA, but to construe the SBTA as it is written. *Nummer v Dep't of Treasury*, 448 Mich 534, 553 n 22; 533 NW2d 250 (1995); *Morgan v Taylor*, 434 Mich 180, 192; 451 NW2d 852 (1990). The courts of this state have consistently recognized that questions of Michigan tax policy are determined by the Legislature, not the courts. *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 414; 488 NW2d 182 (1992) ("[T]he judicial tribunals of the State have no concern with the policy of State taxation . . . .") (citation and quotation marks omitted); *Eagle Trucking Co v Dep't of Treasury*, 115 Mich App 667, 674; 321 NW2d 765 (1982) ("It is the Legislature's function, not this Court's, to determine the wisdom and policy reasons for imposing a particular tax."). Plaintiff's recourse is better directed at the Legislature, because we will not announce a holding that blurs the distinction between the Legislature's and the judiciary's respective roles. See *Melia v Employment Security Comm*, 346 Mich 544, 561-562; 78 NW2d 273 (1956).

Reversed in part. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

PEOPLE v PAYNE

Docket No. 280260. Submitted April 7, 2009, at Grand Rapids. Decided July 28, 2009, at 9:05 a.m.

A Kent Circuit Court jury convicted Scott G. Payne in four cases that were consolidated for trial. In Kent Circuit Court Case No. 06-011607-FC, the defendant was convicted of first-degree criminal sexual conduct (CSC I) and received, as a third-offense habitual offender, a sentence of life imprisonment. In Case No. 06-011875-FC, the defendant was convicted of two counts of CSC I and was sentenced as a third-offense habitual offender to life imprisonment and 40 to 60 years of imprisonment. In Case No. 06-011944-FC, the defendant was convicted of third-degree criminal sexual conduct (CSC III) and received, as a third-offense habitual offender, a sentence of 10 to 30 years of imprisonment. Finally, in Case No. 06-012819-FH, the defendant was convicted of CSC III and was sentenced as a fourth-offense habitual offender to 20 to 40 years of imprisonment. The defendant appealed.

The Court of Appeals *held*:

1. The trial court abused its discretion by requiring the defendant to wear leg shackles in the courtroom. However, because the jury did not see the shackles, inasmuch as the defense table had a skirt and the defendant entered and left the courtroom while the jury was not present, the defendant cannot show prejudice that entitles him to relief.

2. The trial court did not abuse its discretion by permitting the defendant to appear before the jury with eight months of beard growth. The beard, by itself, did not constitute an impermissively distinctive reminder of the defendant's incarcerated status or prejudicially mark him as a prisoner. Moreover, once the defendant objected on the second day of trial, the trial court took immediate measures to provide him with access to grooming supplies before his next appearance in court.

3. The defendant was not denied the effective assistance of counsel when trial counsel failed to meet with him during the time between the preliminary examination and the first day of trial, when counsel failed to secure the defendant's attendance at a pretrial hearing, when counsel failed to retain an expert witness to review the

work of the prosecution's DNA expert, when counsel waived his opening statement, when counsel cross-examined two of the victims, or when counsel failed to object the defendant's appearance in court with a beard and in shackles. Regarding the lack of a meeting between the defendant and counsel, the record indicates that counsel was prepared for trial, displayed an adequate knowledge of the evidence, and was fully prepared to cross-examine the prosecution's witnesses. There was no pretrial hearing for the defendant to attend. The decision to not retain a DNA expert and to waive an opening statement were presumptively matters of effective trial strategy on counsel's part, and the defendant did not meet his heavy burden of overcoming that presumption. The defendant failed to show that the retention of a DNA expert, a different cross-examination of the two witnesses, or an opening statement would have altered the outcome of the trial. Counsel could not be ineffective with respect to his failure to object to the defendant's bearded and shackled appearance in court. Even if the failure to object were error, the defendant cannot demonstrate that, but for that error, the outcome of the trial would have been different.

4. The trial court did not err by accepting waivers of arraignment by mail and did not prevent the defendant from engaging in plea negotiations. The defendant waived formal arraignment, neither party to a criminal trial has a right to present a plea, and the defendant rejected a plea deal.

5. The trial court did not abuse its discretion by sentencing the defendant to 40 to 60 years of imprisonment in Case No. 06-011875-FC. Because the defendant was sentenced as an habitual offender in that case, the judicial sentencing guidelines that would have normally applied at the time were not applicable. Instead, the sentence is reviewed for abuse of discretion. A trial court does not abuse its discretion in giving a sentence within the limits established by the Legislature when, as in this case, the habitual offender's underlying felony, in the context of his or her previous felonies, evidences that the defendant is unable to conform his or her conduct to the laws of society.

6. The trial court did not improperly consider the defendant's lack of remorse during sentencing. The trial court did not improperly attempt to make the defendant admit his guilt or improperly consider the defendant's refusal to admit guilt at sentencing. Nothing in the record suggests that the trial court would have been more lenient had the defendant admitted guilt.

7. Several laboratory reports containing the results of DNA testing constituted inadmissible hearsay and were not admissible pursuant to MRE 803(6) as business records. A laboratory report

prepared by a nontestifying analyst is hearsay and is not admissible unless it fits within the exceptions allowed by MRE 803 and 804. Because the laboratory results at issue were adversarial and were intended to establish an element of the CSC charges against the defendant through the hearsay DNA evidence they contained, the reports were not admissible under MRE 803(6) or 803(8). The erroneous admission of the reports was not harmless because the reports were the only evidence that established an element of the CSC charges against the defendant in Case Nos. 06-011607-FC and 06-011944-FC.

8. The admission of the hearsay laboratory reports in Case Nos. 06-011607-FC and 06-011944-FC violated the defendant's Sixth Amendment right to confront the witnesses against him. A laboratory report prepared by a nontestifying analyst is testimonial hearsay and, absent a showing that the analyst is unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine the analyst, is inadmissible. The plain constitutional error represented by the erroneous admission of the reports in Case Nos. 06-011607-FC and 06-011944-FC requires a reversal of the defendant's convictions in those cases because the error affected the fairness and integrity of the trial in view of the fact that the DNA laboratory reports were the most damning evidence and were decisive of the outcome of the trial.

Convictions and sentences in Case Nos. 06-011875-FC and 06-012819-FH affirmed; convictions and sentences in Case Nos. 06-011607-FC and 06-011944-FC reversed.

1. CRIMINAL LAW — TRIAL — RESTRAINTS ON DEFENDANTS.

A defendant may be shackled during trial only if the record evidence indicates that it is necessary to prevent escape or injury to persons in the courtroom, or to maintain order; a trial court's decision to shackle a defendant is reviewed on appeal for abuse of discretion; even if the trial court abuses its discretion, the defendant is not entitled to relief unless the defendant shows that he or she suffered prejudice.

2. CRIMINAL LAW — TRIAL — DEFENDANT'S PHYSICAL APPEARANCE.

A defendant generally has the right to appear before the court with the appearance, dignity, and self-respect of a free and innocent person.

3. CRIMINAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant, in order to establish ineffective assistance of counsel, must show that counsel's performance was deficient and that the

deficient performance prejudiced the defense; performance is measured against an objective standard of reasonableness; to demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

4. CRIMINAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL — TRIAL — FAILURE TO CALL WITNESSES — WAIVERS OF OPENING STATEMENT.

Counsel's decisions on whether to retain witnesses, including expert witnesses, and on whether to waive an opening statement are presumed to be matters of trial strategy, and a defendant must meet a heavy burden to overcome the presumption when claiming ineffective assistance of counsel.

5. SENTENCES — REFUSAL TO ADMIT GUILT.

A sentencing court cannot base a sentence, even in part, on a defendant's refusal to admit guilt; when determining if a sentencing court improperly considered a defendant's refusal to admit guilt, the reviewing court should examine the following factors: the defendant's maintenance of innocence after conviction, the sentencing court's attempt to get the defendant to admit guilt, and the appearance that, had the defendant affirmatively admitted guilt, the sentence would not have been so severe.

6. EVIDENCE — HEARSAY EXCEPTIONS — PUBLIC RECORDS — BUSINESS RECORDS — POLICE LABORATORY REPORTS — CRIMINAL SEXUAL CONDUCT.

A police laboratory report containing DNA test results identifying a defendant as the perpetrator of a criminal sexual conduct offense is hearsay and is not admissible under the business records exception or the public records exception to the hearsay rule (MRE 803[6], [8]).

7. EVIDENCE — TESTIMONIAL HEARSAY — ADMISSIBILITY.

A police laboratory report prepared by a nontestifying analyst is testimonial hearsay and is not admissible absent a showing that the analyst is unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine the analyst.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *Gary A. Moore*, Assistant Prosecuting Attorney, for the people.

Peter Ellenson and Scott G. Payne, *in propria persona*, for the defendant.

Before: SAAD, C.J., and JANSEN and HOEKSTRA, JJ.

JANSEN, J. Defendant appeals by right his jury-trial convictions in four separate cases, all of which were joined for trial. In Kent Circuit Court Case No. 06-011607-FC, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f).[1] In Kent Circuit Court Case No. 06-011875-FC, defendant was convicted of two counts of CSC I, MCL 750.520b(1)(e) (Count 1), and MCL 750.520b(1)(f) (Count 2).[2] In Kent Circuit Court Case No. 06-011944-FC, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a).[3] In Kent Circuit Court Case No. 06-012819-FH, defendant was convicted of CSC III, MCL 750.520d(1)(b).[4] Defendant was acquitted in a fifth, separate case. We affirm in part and reverse in part.

I

Defendant first argues that he was denied his right to a fair trial when he was forced to appear in court with

[1] In Kent Circuit Court Case No. 06-011607-FC, defendant was sentenced as a third-offense habitual offender, MCL 769.11, to life imprisonment.

[2] In Kent Circuit Court Case No. 06-011875-FC, defendant was sentenced as a third-offense habitual offender, MCL 769.11, to life imprisonment for Count 1 and to 40 to 60 years in prison for Count 2.

[3] In Kent Circuit Court Case No. 06-011944-FC, defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 10 to 30 years in prison.

[4] In Kent Circuit Court Case No. 06-012819-FH, defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 20 to 40 years in prison.

an unshaven face, wearing leg shackles, and surrounded by armed guards in the courtroom during the first two days of trial. We review a trial court's decision to shackle a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). With respect to a defendant's physical appearance during trial, we also review the trial court's decision for an abuse of discretion. See *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). We defer to the trial court's superior opportunity to observe the defendant and to determine whether the defendant's appearance prejudicially marks him or her as a prisoner. *Id*. at 152.

A

Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom. *Dixon*, 217 Mich App at 404. While this right is not absolute, a defendant "may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). But even if a trial court abuses its discretion and requires a defendant to wear restraints, the defendant must show that he suffered prejudice as a result of the restraints to be entitled to relief. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id*. We conclude that the trial court abused its discretion by requiring defendant to wear leg shackles in the courtroom because the court's decision in this regard was not supported by the record evidence. There was quite simply no evidence to suggest that defendant was a flight risk,

that he was likely to attempt to escape, or that shackles were needed to maintain order in the courtroom. However, defendant has failed to show that he suffered prejudice. Indeed, the record shows that the defense table in the courtroom was skirted with paper, which prevented the jury from seeing the shackles. Moreover, defendant entered and left the courtroom while the jury was not present. We perceive no actual prejudice to defendant on the facts of this case.

B

We conclude that the trial court did not abuse its discretion with respect to defendant's personal appearance. It is true that a criminal defendant generally has the right to appear before the court " 'with the appearance, dignity, and self-respect of a free and innocent man . . . .' " *People v Shaw*, 381 Mich 467, 474; 164 NW2d 7 (1969) (citation omitted). Defendant contends that he was required to appear before the jury with eight months of beard growth because jail personnel had not allowed him to shave. We cannot conclude that defendant's beard alone constituted an impermissibly distinctive reminder of defendant's incarcerated status or prejudicially marked him as a prisoner. See *Harris*, 201 Mich App at 152. Moreover, defendant did not object to his appearance in court until the second day of trial, at which time the trial court took immediate measures to provide him with access to grooming supplies before his next appearance in court. Under these circumstances, we find no abuse of discretion. Defendant was not denied his right to a fair trial.

C

Defendant also refers in his statement of the questions presented to his appearance in court "surrounded

by armed guards." Defendant has abandoned this issue by failing to provide any analysis in the text of his brief on appeal. MCR 7.212(C)(7); *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995). Even more importantly, we note that the record is devoid of any evidence that defendant was "surrounded" by armed guards at any time during trial. We perceive no error in this regard.

II

Defendant next argues that he was denied the constitutional right to effective assistance of counsel. Although the trial court rejected his motion, defendant preserved his claim of ineffective assistance of counsel by moving for a new trial or *Ginther*[5] hearing in the court below. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Nonetheless, because no *Ginther* hearing was held, our review is limited to mistakes apparent on the record. *Id.*; see also *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court explained the test for determining whether a criminal defendant has been denied the effective assistance of counsel. A defendant must first show that defense counsel's performance was deficient and, second, that counsel's " 'deficient performance prejudiced the defense.' " *Id.* at 600 (citation omitted); see also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To

[5] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600.

A

Defendant first contends that defense counsel's failure to meet with him during the time between the preliminary examination and the first day of trial amounted to ineffective assistance of counsel. However, the record reveals that defense counsel was prepared for trial, displayed an adequate knowledge of the evidence, and was fully prepared to cross-examine the prosecution's witnesses. We cannot conclude that counsel's performance in this regard fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Similarly, defendant asserts that defense counsel's failure to secure his attendance at a "single pretrial hearing" amounted to ineffective assistance of counsel. But the record indicates that defendant waived formal arraignment and that there were no pretrial hearings that took place between the preliminary examination and the first day of trial. Thus, we cannot conclude that defense counsel was ineffective in this regard.

B

Defendant next contends that several strategic decisions made by his trial attorney constituted ineffective assistance of counsel. Specifically, defendant asserts that defense counsel should have retained independent expert witnesses to review the work of the prosecution's DNA experts, that defense counsel improperly cross-examined two of the victims, and that defense counsel should not have waived his

opening statement. An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. *Id*. In general, the failure to call a witness can constitute ineffective assistance of counsel only when it "deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Similarly, the waiver of an opening statement involves "a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel." *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

In addition, we note that irrespective of whether defense counsel's decision concerning whether to retain independent experts was proper trial strategy, defendant has merely speculated that an independent expert could have provided favorable testimony. In other words, defendant has failed to show that the retention of an independent expert would have altered the outcome of the lower court proceedings. *Carbin*, 463 Mich at 600. Similarly, with respect to defense counsel's cross-examination of the two victims, as well as counsel's decision to forgo an opening statement, defendant has failed to establish that his attorney performed deficiently under an objective standard of reasonableness or that counsel's specific actions affected the outcome of the lower court proceedings. *Id*.

C

Defendant contends that defense counsel was ineffective for failing to object to defendant's appearance in court with a "wild beard" and leg shackles. As we have already stated, defendant cannot show that the shackles prejudiced him because the jury never saw them. *Horn*, 279 Mich App at 36. Nor has defendant shown that he was in any way prejudiced by his appearance at trial, including the presence of facial hair. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). And even assuming that counsel did err by failing to object in this regard, defendant cannot demonstrate that, but for counsel's alleged errors, the outcome of trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

III

Defendant next argues that the trial court erred by accepting waivers of arraignment by mail, thus denying him the right to engage in plea negotiations. Defendant waived formal arraignment on the informations and pleaded "not guilty" to the charges when he and his attorney signed waiver forms and provided them to the trial court. The trial court properly accepted the waivers and did not deny defendant any of his pretrial rights in this respect. See MCR 6.113(C). Further, we note that defendant's contention that he had the "right" to engage in plea negotiations with the prosecution lacks merit. As our Supreme Court has noted, "neither this Court nor the United States Supreme Court has recognized that the parties have a right to present a plea." *People v Grove*, 455 Mich 439, 469 n 36; 566 NW2d 547 (1997); see also *Santobello v New York*, 404 US 257, 261-262; 92 S Ct 495; 30 L Ed 2d 427 (1971). In addition, defendant rejected a

plea bargain on the first day of trial and indicated during his testimony that he did so because he "was innocent." We find no error.

IV

Next, defendant argues that the trial court improperly exceeded the sentencing guidelines by sentencing him to 40 to 60 years in prison for Count 2 in Kent Circuit Court Case No. 06-011875-FC. The offense for which defendant was convicted, and which gave rise to this sentencing issue, occurred in August 1989. Therefore, the former judicial sentencing guidelines promulgated by the Michigan Supreme Court would normally apply in this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). However, defendant was sentenced for this conviction as an habitual offender, and the judicial sentencing guidelines are inapplicable to the sentencing of habitual offenders. *People v Coy*, 258 Mich App 1, 23; 669 NW2d 831 (2003); *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). "Nevertheless, the principle of proportionality applies." *Coy*, 258 Mich App at 23.

In cases such as this, we review the trial court's sentencing of an habitual offender for an abuse of discretion. *Hansford*, 454 Mich at 324. In the context of sentencing before the legislative guidelines, "a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Id*. at 326.

Defendant's criminal history and underlying felonies showed that he could not conform his conduct to the laws of society, and the sentence imposed by the trial

court was within the statutory limits established by the Legislature. *Id*. Defendant's criminal history at the time he committed the offense at issue showed that he had committed prior violent sexual assaults. With respect to the felony giving rise to the challenged sentence, itself, defendant attacked the victim while she was alone in a field at night. He brutally beat her by punching and hitting her in the face, and he choked her before throwing her to the ground and tying her hands and feet so she could not escape. Defendant threatened to kill the victim and informed her that she would soon be dead. In addition, defendant held a knife to the victim's throat, and forced her to perform fellatio after penetrating her on two separate occasions with his penis. Defendant then left the victim alone, naked, and tied up in a field. The Legislature has prescribed a sentence of "imprisonment for life or for any term of years" for CSC I, MCL 750.520b(2)(a), and has likewise specified that upon sentencing a defendant as a third-offense habitual offender, "[i]f the subsequent felony is punishable upon a first conviction by imprisonment for life, the court . . . may sentence the person to imprisonment for life or for a lesser term," MCL 769.11(1)(b). In light of the nature of the sentencing offense, and given defendant's criminal history at the time, we conclude that the sentence of 40 to 60 years in prison did not violate the principle of proportionality. See *Coy*, 258 Mich App at 23. We find no abuse of discretion. *Hansford*, 454 Mich at 326.

V

Defendant also argues that the trial court improperly considered his lack of remorse during sentencing. Specifically, defendant argues that the trial court improperly based its sentencing decision on his assertion of innocence. "A sentencing court cannot base a sentence

even in part on a defendant's refusal to admit guilt." *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007). We look to three factors to determine if a sentencing court improperly considered a defendant's refusal to admit guilt: "(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). Applying these factors, it does not appear to us that the trial court improperly attempted to make defendant admit his guilt or improperly considered defendant's refusal to admit guilt at sentencing. While it is true that defendant maintained his innocence at the sentencing hearing, nothing in the record suggests that the trial court would have been more lenient had defendant admitted guilt. Resentencing is not warranted on these facts. *Dobek*, 274 Mich App at 106.

VI

Defendant has raised certain additional claims of error in his supplemental brief, filed *in propria persona*. We address these issues seriatim.

A

Defendant first contends in his supplemental brief that several laboratory reports containing the results of DNA testing should not have been admitted into evidence under Federal Rules of Evidence 1002 and 1003. As an initial matter, we note that this was a state prosecution in state court, and that the Federal Rules of Evidence were accordingly inapplicable. It is true that MRE 1002 and 1003—like FRE 1002 and 1003—govern the requirement of an original document and the ad-

missibility of duplicate documents into evidence. However, there is quite simply no evidence that the laboratory reports admitted in this case were anything other than accurate and complete copies of the originals. See MRE 1003. Defendant has not sufficiently developed this argument, and we therefore decline to consider it further. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

B

Defendant also contends that the trial court erred by admitting the laboratory reports over his objection in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC[6] because the reports constituted inadmissible hearsay. Defendant asserts that the reports were not admissible pursuant to MRE 803(6) as business records. He also argues that because foundation witness Allisa Gindlesperger did not prepare the reports herself, she was unqualified to provide foundation testimony as a "custodian or other qualified witness." We conclude that the reports constituted inadmissible hearsay, and were admitted in error.

At trial there was no dispute that the contents of the laboratory reports amounted to hearsay evidence. MRE 801 and 802. But the trial court admitted the records under MRE 803(6), which excepts from the hearsay rule

[6] Unlike the laboratory reports admitted in Kent Circuit Court Case Nos. 06-011875-FC and 06-012819-FH, which were prepared by analysts who *did* testify at trial, a nontestifying analyst prepared the laboratory reports admitted in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC.

> [a] memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Our Supreme Court has made clear that a laboratory report prepared by a nontestifying analyst "is, without question, hearsay." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "As such, pursuant to MRE 802, it is not admissible unless it fits within at least one category of the allowable exceptions outlined in MRE 803 and 804." *Id*. Because the laboratory reports at issue were adversarial and were intended to establish an element of the CSC charges against defendant through the hearsay DNA evidence they contained, the reports were not admissible as business records under MRE 803(6) or as public records under 803(8). *McDaniel*, 469 Mich at 413-414. Furthermore, the erroneous admission of the hearsay laboratory reports was not harmless because the reports were the only evidence that established an essential element of the CSC charges against defendant in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC. *Id*. at 413.

C

Defendant lastly contends that the admission of the hearsay laboratory reports in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC violated his Sixth Amendment right to confront the witnesses against him. We agree.

The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Walker*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006).

In *People v Lonsby*, 268 Mich App 375, 392-393; 707 NW2d 610 (2005), now Chief Judge SAAD concluded that a laboratory report prepared by a nontestifying analyst was testimonial hearsay within the meaning of *Crawford*. In *Lonsby*, the in-court testimony of one analyst was offered for the purpose of introducing the laboratory report, findings, and conclusions of a different, nontestifying analyst. Judge SAAD concluded that the inculpatory laboratory report, prepared by the nontestifying analyst, constituted testimonial hearsay within the meaning of *Crawford*. *Id*. Specifically, Judge SAAD wrote that because there was "no showing that [the nontestifying analyst] was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." *Id*. at 393.

We acknowledge that because the other members of the *Lonsby* panel concurred in the result only, *Lonsby* is not binding precedent. See *Fogarty v Dep't of Transportation*, 200 Mich App 572, 574-575; 504 NW2d 710 (1993). However, Judge SAAD's well-reasoned opinion in *Lonsby* is fully consistent with the United States Supreme Court's recent decision in *Melendez-Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009). In *Melendez-Diaz*, the United States Supreme Court concluded that certain affidavits—which certified the out-of-court findings of

nontestifying laboratory analysts—constituted testimonial hearsay because they had been prepared for the purpose of establishing an element of the criminal charges against the defendant. The *Melendez-Diaz* Court concluded that the hearsay affidavits were consequently inadmissible against the defendant "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them . . . ." *Id*. at ___; 129 S Ct at 2532 (emphasis in original). Because Judge SAAD's opinion in *Lonsby* fully comports with the recent decision in *Melendez-Diaz*, we adopt the reasoning of *Lonsby* as our own.

Similar to the facts of *Lonsby* and *Melendez-Diaz*, in the instant case, DNA testing was conducted and it resulted in the generation of laboratory reports that were used against defendant at trial. Just as the nontestifying laboratory analysts in *Melendez-Diaz* knew that their affidavits would later be used in criminal proceedings to establish that the defendant in that case had possessed cocaine, it is clear to us that the nontestifying analyst who generated the reports in the present case must have known that the purpose was to ultimately establish the perpetrator's identity through DNA evidence. Although the witnesses who actually testified concerning the laboratory reports at issue here had basic knowledge concerning DNA testing and the methods used to prepare the reports in general, they had not personally conducted the testing, had not personally examined the evidence collected from the victims, and had not personally reached any of the scientific conclusions contained in the reports. In short, the laboratory reports admitted in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC constituted testimonial hearsay, *Lonsby*, 268 Mich App at 392-393, and "[a]bsent a showing that the analyst[] [was] unavail-

able to testify at trial *and* that [defendant] had a prior opportunity to cross-examine [the analyst]," defendant "was entitled to ' "be confronted with" ' the analyst[] at trial," *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2532, quoting *Crawford*, 541 US at 54. No such showing was ever made. Accordingly, the trial court plainly erred by admitting the laboratory reports of the nontestifying analyst in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC.

Of course, although defense counsel did object to the admission of the laboratory reports on the ground that they were inadmissible under the rules of evidence, counsel did not object to the admission of the reports on Confrontation Clause grounds. Therefore, defendant's Confrontation Clause argument was not preserved, *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005), and we must therefore determine whether the plain constitutional error affected defendant's substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In order to avoid forfeiture under the plain-error rule, it must be shown that the plain error affected the outcome of lower court proceedings. *Id*. at 763. And even then, we will generally reverse only if the defendant is actually innocent or the error has seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id*. at 763-764.

After reviewing the record, we are compelled to conclude that the improperly admitted laboratory reports were decisive to the outcome of defendant's trial. Taken together, the DNA laboratory reports far and away constituted the single most condemning piece of evidence introduced against defendant in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC. Unlike Kent Circuit Court Case No. 06-012819-FH, in

which defendant admitted that he had solicited the victim for sex, defendant never admitted to any contact whatsoever with the victims in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC. No other physical evidence linked defendant to the crimes. Indeed, only the DNA evidence contained in the hearsay laboratory reports tied defendant to the victims in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC. Albeit in a different context, this Court has recognized the "significant possibility" that a jury might attribute preemptive or undue weight to improperly admitted DNA evidence. *People v Coy*, 243 Mich App 283, 302-303; 620 NW2d 888 (2000). We simply cannot say that the jury would have convicted defendant in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC if the improper hearsay reports had been excluded from consideration. Defendant has sufficiently demonstrated that the plainly erroneous admission of the testimonial hearsay reports affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763-764.

We also believe that the erroneous admission of the testimonial hearsay evidence affected the fairness and integrity of defendant's trial. *Id*. at 764. There simply was no other independent and properly admitted evidence of defendant's guilt sufficient to erase or overcome the overwhelming taint of the improperly admitted hearsay reports. See *Coy*, 243 Mich App at 313. Although the *Carines* plain-error rule sets a high bar for appellate review in cases of unpreserved error, we conclude that the plainly erroneous admission of the testimonial DNA reports in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC affected the fairness and integrity of the judicial proceedings. *Carines*, 460 Mich at 764.[7]

[7] In contrast to Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC, the laboratory analysts who conducted the DNA testing

VII

Given the preserved evidentiary error and outcome-determinative plain constitutional error discussed earlier, we must reverse defendant's convictions and sentences in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC. In general, the constitutional principle of double jeopardy does not bar reprosecution after a defendant's original conviction has been reversed on appeal. *Green v United States*, 355 US 184, 189; 78 S Ct 221; 2 L Ed 2d 199 (1957); *United States v Wilson*, 534 F2d 76, 78 (CA 6, 1976). The exception to this rule, of course, is that double jeopardy bars reprosecution after a conviction has been reversed on the ground of "evidentiary insufficiency" or "failure of proof at trial." *Burks v United States*, 437 US 1, 15-16; 98 S Ct 2141; 57 L Ed 2d 1 (1978). However, we have reversed defendant's convictions in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC on the basis of trial error rather than evidentiary insufficiency. Thus, the prosecution may retry defendant on these charges if it so chooses.

Defendant's convictions and sentences in Kent Circuit Court Case Nos. 06-011875-FC and 06-012819-FH are affirmed. Defendant's convictions and sentences in Kent Circuit Court Case Nos. 06-011607-FC and 06-011944-FC are reversed.

Affirmed in part and reversed in part. We do not retain jurisdiction.

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and prepared the laboratory reports in Kent Circuit Court Case Nos. 06-011875-FC and 06-012819-FH *did* testify at trial. We perceive no evidentiary or Confrontation Clause error with respect to the admission of the laboratory reports in Kent Circuit Court Case Nos. 06-011875-FC and 06-012819-FH.

PEOPLE v GAYHEART

Docket No. 282690. Submitted April 8, 2009, at Grand Rapids. Decided July 30, 2009, at 9:00 a.m.

A jury in the St. Joseph Circuit Court, Paul E. Stutesman, J., convicted Dannie Gayheart of premeditated murder and felony murder, alternatively predicated on the alleged underlying felonies of kidnapping and larceny, and the defendant was sentenced to life imprisonment without parole. The defendant appealed, alleging that the trial court lacked statutory jurisdiction to try him because there was insufficient proof that the crime took place in Michigan since the victim's body was discovered in Indiana. The defendant also alleged a violation of his right to due process.

The Court of Appeals *held*:

1. The jury was properly instructed regarding the elements of both kidnapping and larceny.

2. A trial court in a case where territorial jurisdiction is placed in issue must initially decide as a question of law whether the facts to be offered by the prosecution, if proven, would be legally adequate to confer jurisdiction under MCL 762.2. Once this initial gatekeeping determination has been made, and assuming that the exact location of a boundary line is not at issue in the case, the trier of fact must next determine as a factual matter whether the alleged act, consequence, or other condition that would confer territorial jurisdiction under MCL 762.2 did in fact occur within the state of Michigan. The prosecution must prove to the trier of fact beyond a reasonable doubt that the alleged act, consequence, or other condition that would confer territorial jurisdiction under MCL 762.2 did in fact occur within the state of Michigan. The fact that the Legislature has not defined the existence of territorial jurisdiction as an "element" of a criminal offense does not compel a contrary conclusion.

3. The existence of territorial jurisdiction may be proven by circumstantial evidence.

4. Although the trial court did not make an initial determination whether the evidence to be presented by the prosecution, if

proven, would be sufficient to confer territorial jurisdiction under MCL 762.2, a review de novo by the Court of Appeals shows that the question should have been answered in the affirmative.

5. There was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant committed at least one element of premeditated murder and one element of felony murder in the state of Michigan. Therefore, even though the evidence suggested that the fatal blows were struck in Indiana and the victim's body was found there, the trial court had territorial jurisdiction under MCL 762.2(1)(a) and (2)(a) to try the defendant under the laws of Michigan.

6. It does not appear that the exercise of territorial jurisdiction exclusively under MCL 762.2(1)(d), which confers jurisdiction where the victim of the offense resides in Michigan at the time the criminal offense is committed, would withstand the United States Supreme Court's holding that nominal residence, standing alone, is inadequate to justify the choice of one state's law over that of another. However, the exercise of territorial jurisdiction under MCL 762.2(1)(a) in this case was constitutional because it was proven that at least one essential element of both premeditated murder and felony murder was committed within Michigan. There was a significant contact or significant aggregation of contacts so that the application of Michigan's criminal law was neither arbitrary nor fundamentally unfair and the defendant's conduct directly violated the peace, tranquility, and laws of Michigan, establishing a sufficient nexus so as to permit the constitutional exercise of territorial jurisdiction in conformity with constitutional due process.

7. Venue was proper in St. Joseph County because an element of both premeditated murder and felony murder was committed there.

8. The trial court did not abuse its discretion by admitting into evidence highly probative photographs of the victim. The probative value of the photographs was not outweighed by the danger of undue prejudice.

Affirmed.

1. CRIMINAL LAW — TERRITORIAL JURISDICTION.

A trial court in a criminal case where territorial jurisdiction is placed in issue must initially decide as a question of law whether the facts to be offered by the prosecution, if proven, would be legally adequate to confer jurisdiction under MCL 762.2; next, where the exact location of a boundary line is not at issue, the trier of fact must determine as a factual matter that the prosecution has proven beyond a reasonable doubt that the alleged act, conse-

quence, or other condition that would confer territorial jurisdiction under the statute did in fact occur within the state of Michigan.

2. CRIMINAL LAW — TERRITORIAL JURISDICTION — EVIDENCE — CIRCUMSTANTIAL EVIDENCE.

The existence of territorial jurisdiction over a criminal matter under MCL 762.2 may be proven by circumstantial evidence.

3. CONSTITUTIONAL LAW — DUE PROCESS — JURISDICTION.

The Due Process Clause forbids a state from applying its own substantive or criminal law to a transaction, occurrence, or crime in which the state has insufficient interests or with which the state has insufficient contacts; a state may constitutionally apply its own law if the state has a significant contact or significant aggregation of contacts, creating state interests, so that application of its law is neither arbitrary nor fundamentally unfair.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Douglas K. Fisher*, Prosecuting Attorney, and *William E. Molner*, Assistant Attorney General, for the people.

Bennett Law Office (by *P. E. Bennett*) for the defendant.

Before: SAAD, C.J., and JANSEN and HOEKSTRA, JJ.

JANSEN, J. Defendant appeals by right his jury-trial conviction of first-degree murder,[1] for which he was sentenced to life imprisonment without parole. We affirm.

I

The evidence presented at trial established that the victim, Rosemary Reinel, had lived in an apartment

[1] The jury convicted defendant of both premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b).

complex in St. Joseph County, Michigan, since 2001. Defendant briefly lived in the same apartment complex with a roommate. At some point, the victim became interested in moving to Florida. Defendant apparently learned of this and asked the victim to allow him to drive with her in her car to Florida. Defendant wanted to go to Florida so that he could visit Teresa Mock, a woman with whom he had been romantically involved in the past. The victim initially agreed to allow defendant to drive with her to Florida, but later changed her mind when she learned that defendant was on parole for an unrelated offense.

The victim was last seen on September 20, 2005. The police found the victim's white automobile in a Florida parking lot on September 29, 2005. Defendant was then arrested in Florida after breaking into Mock's home.

On November 1, 2005, the victim's body was discovered in a cornfield in northern Indiana. The cornfield was less than 100 feet from the boundary between Michigan and Indiana. A witness testified that she had seen a white car similar to the victim's automobile parked in a lane leading to the cornfield in late September 2005. The witness remembered the event as unusual because she had never before seen an automobile parked in that lane. A friend of the victim identified certain items that were found near the victim's body as personal property of the victim, which had been stored in the victim's car. A forensic entomologist testified that his observations and calculations indicated that the victim had likely died between September 14, 2005, and September 21, 2005. Cellular phone records indicated that defendant had placed a phone call from the vicinity of the northern Indiana cornfield on the morning of September 20, 2005.

Defendant's roommate testified that defendant had left the apartment "real early" on the morning of

September 20, 2005, and that defendant appeared "agitated" when he returned home at about noon that day. When defendant returned, his roommate saw him washing and cleaning a pair of Channellock pliers. Defendant's roommate testified that "what [defendant] was wiping off was red" and that "there looked like pieces of hair" on the pliers. Defendant left the apartment shortly thereafter, but later called his roommate and asked him to "lie for him to the police." When the roommate saw defendant again a day or two later, defendant had "a whole wad of money," which was "quite . . . big" and consisted of "hundreds, fifties, [and] twenties."[2] Defendant's roommate never again saw the pair of Channellock pliers.

A maintenance man who worked for the apartment complex where defendant lived testified that sometime after September 20, 2005, he realized that a large pair of Channellock pliers was missing or had been stolen from a utility room on the premises. No one on the apartment complex maintenance staff could account for what had happened to the pliers, which were never seen again.

It was the prosecution's theory that defendant had taken the missing Channellock pliers and had used them to kill the victim by inflicting several blows to her head. Although the victim's body was partially decomposed when it was found, the evidence showed that she had sustained serious head trauma. On the basis of the pattern of skull fractures, it was determined that there had likely been between seven and nine individual blows to the head with a blunt object.

The jury was properly instructed with respect to the elements of both premeditated murder and felony mur-

[2] A bank employee testified that the victim had withdrawn $2,970 in cash on the morning of September 16, 2005.

der.[3] The jury was further instructed, with respect to both charges, that "[i]n this case the prosecutor must also prove beyond a reasonable doubt that [the victim] was a resident of the State of Michigan, St. Joseph County, at the time of her death, and that the Defendant committed some act toward the commission of the crime while within the State of Michigan, County of St. Joseph . . . ." The verdict form contained in the lower court file indicates that the jury returned verdicts of guilty on both charges.

II

Defendant argues that because the victim's body was discovered in Indiana, there was insufficient proof that the crime took place in Michigan. He contends that the trial court was without statutory jurisdiction to try him. He also contends that his trial violated due process. As noted previously, the jury convicted defendant of both premeditated murder and felony murder. For the reasons that follow, we conclude that territorial jurisdiction existed under MCL 762.2 to try defendant for both charged offenses in this case. We further conclude that defendant's trial did not violate the constitutional guarantee of due process.

A

We review de novo issues of constitutional and statutory interpretation, as well as all other questions of law. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007); *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

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[3] The charge of felony murder was alternatively predicated on the alleged underlying felonies of kidnapping and larceny. The jury was properly instructed on the elements of both kidnapping and larceny.

B

Relying in part on *People v Blume*, 443 Mich 476; 505 NW2d 843 (1993), defendant argues that the state of Michigan was without authority to exercise territorial jurisdiction with respect to the murder at issue in this case because the crime occurred in Indiana and its detrimental effects were not intended to be felt in Michigan. "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," and "[a]ny attempt to exercise authority beyond those limits" constitutes "an illegitimate assumption of power." *Stewart v Eaton*, 287 Mich 466, 474; 283 NW 651 (1939). However, nearly 100 years ago, the United States Supreme Court announced that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm . . . ." *Strassheim v Daily*, 221 US 280, 285; 31 S Ct 558; 55 L Ed 735 (1911). Until 2002, the common-law rule in Michigan, which drew heavily on the United States Supreme Court's decision in *Strassheim*, was that the state could not exercise territorial jurisdiction over criminal conduct committed in another state unless that conduct was intended to have, and did in fact have, "a detrimental effect within the state." *Blume*, 443 Mich at 477. The *Blume* Court observed that "[u]nlike some states, Michigan has not enacted legislation generally defining the reach of its criminal statutes." *Id*. at 480 n 7.

The Legislature responded in 2002 by enacting MCL 762.2, which provides:

> (1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist:

> (a) He or she commits a criminal offense wholly or partly within this state.
>
> (b) His or her conduct constitutes an attempt to commit a criminal offense within this state.
>
> (c) His or her conduct constitutes a conspiracy to commit a criminal offense within this state and an act in furtherance of the conspiracy is committed within this state by the offender, or at his or her instigation, or by another member of the conspiracy.
>
> (d) A victim of the offense or an employee or agent of a governmental unit posing as a victim resides in this state or is located in this state at the time the criminal offense is committed.
>
> (e) The criminal offense produces substantial and detrimental effects within this state.
>
> (2) A criminal offense is considered under subsection (1) to be committed partly within this state if any of the following apply:
>
> (a) An act constituting an element of the criminal offense is committed within this state.
>
> (b) The result or consequences of an act constituting an element of the criminal offense occur within this state.
>
> (c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed.

It is well settled that the Legislature has the power to alter or abrogate the common law. Const 1963, art 3, § 7; *People v Lively*, 470 Mich 248, 252; 680 NW2d 878 (2004). The language of MCL 762.2 has broadened the scope of Michigan's territorial jurisdiction over criminal matters, significantly expanding upon the common-law rule explained in *Blume*. For instance, pursuant to MCL 762.2(1)(a) and (2)(a), Michigan now has statutory territorial jurisdiction "over any crime

where any act constituting an element of the crime is committed within Michigan," *People v King*, 271 Mich App 235, 243; 721 NW2d 271 (2006), even if there is no indication that the accused actually intended the detrimental effects of the offense to be felt in this state.

C

The elements of premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation. MCL 750.316(1)(a); *People v Unger*, 278 Mich App 210, 223, 229; 749 NW2d 272 (2008); *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007); *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). The charge of felony murder in this case was based alternatively on the alleged predicate felonies of larceny and kidnapping, both of which are specifically enumerated in MCL 750.316(1)(b). After reviewing the record, we conclude that the jury was properly instructed on the elements of both kidnapping and larceny. It is axiomatic that jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *Unger*, 278 Mich App at 235.

D

At the outset, we note that the prosecution urges us to hold that the existence of territorial jurisdiction

under MCL 762.2 is a pure question of law to be decided by the trial court. We conclude that the trial court must decide as an initial matter of law whether a particular alleged act, consequence, or other condition, if proven beyond a reasonable doubt to have occurred within this state, would be legally sufficient to confer jurisdiction under MCL 762.2. However, we conclude that it is for the trier of fact to decide as a question of fact whether the alleged act, consequence, or other condition actually occurred in Michigan.

Whether a statute applies is generally a question of law, *Alex v Wildfong*, 460 Mich 10, 21; 594 NW2d 469 (1999), as is the proper interpretation and application of a statute, *People v Coutu*, 459 Mich 348, 353; 589 NW2d 458 (1999). Therefore, we conclude that it is for the trial court to initially decide as a question of law whether a particular alleged act, consequence, or other condition would be legally sufficient to confer territorial jurisdiction. Stated another way, the trial court must exercise an initial gatekeeping function by first determining whether the facts to be offered by the prosecution, if proven, would be legally adequate to confer jurisdiction under MCL 762.2.

Once this initial gatekeeping determination has been made, however, and assuming that the exact location of a boundary line is *not* at issue in the case,[4]

[4] We stress that the exact location of the boundary line between Michigan and Indiana *was not* at issue in this case. When, on the other hand, the exact location of a boundary line *is* at issue, the trier of fact must determine whether the particular geographic situs set forth in the information or identified through the proofs at trial is, in fact, located within the boundaries of the state of Michigan. Although the existence of jurisdiction is generally a question of law, *People v Laws*, 218 Mich App 447, 451; 554 NW2d 586 (1996), "the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law," *United States v Jackalow*, 66 US

the trier of fact must next determine as a factual matter whether the alleged act, consequence, or other condition that would confer territorial jurisdiction under MCL 762.2 did in fact occur within the state of Michigan. The clear majority rule in this country is to require the trier of fact to find beyond a reasonable doubt that the alleged act, consequence, or other condition that would confer jurisdiction has in fact occurred within the territorial jurisdiction of the court when the matter is placed in issue. See, e.g., *State v Butler*, 353 Md 67, 79; 724 A2d 657 (1999) (holding that "when evidence exists that the crime may have been committed outside Maryland's territorial jurisdiction and a defendant disputes the territorial jurisdiction of the Maryland courts to try him or her, the issue of where the crime was committed is fact-dependent and thus for the trier of fact"); *State v Willoughby*, 181 Ariz 530, 538; 892 P2d 1319 (1995) (holding that "[i]n the very rare case in which jurisdiction is legitimately in issue because of contradicting jurisdictional facts, Arizona's territorial jurisdiction must be established beyond a reasonable doubt by the

484, 487; 17 L Ed 225 (1861). While the *description* of a boundary line between two states is a matter of law for the trial court rather than for the jurors, "the application of the evidence in the ascertainment of [the boundary] as thus described and interpreted, with a view to its location and settlement, belongs to the jury." *Id*.; see also *People v Hillman*, 246 NY 467, 474; 159 NE 400 (1927). Thus, when the matter is in issue, all the testimony and evidence concerning the exact, physical location of a boundary line "should be submitted to [the trier of fact] under proper instructions to find the fact." *Jackalow*, 66 US at 488. Indeed, it has long been the law in Michigan that when the exact location of a boundary line is placed in issue by the proofs, "the exact place where [a boundary] line . . . runs is a question of fact rather than of law," and that the matter is therefore properly submitted to the jury. *Wilmarth v Woodcock*, 66 Mich 331, 334; 33 NW 400 (1887). Like any other controverted factual issue in a criminal matter, the exact location of a state's boundary line in such cases must be found beyond a reasonable doubt. See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

jury"); *State v Liggins*, 524 NW2d 181, 184-185 (Iowa, 1994) (observing that, if placed in issue by the proofs, the issue of territorial jurisdiction "is properly submitted at trial" and that "[t]he State is required to prove territorial jurisdiction beyond a reasonable doubt"); *People v McLaughlin*, 80 NY2d 466, 472; 591 NYS2d 966; 606 NE2d 1357 (1992) (holding that "territorial jurisdiction must be proven beyond a reasonable doubt"); *Lane v State*, 388 So 2d 1022, 1028-1029 (Fla, 1980) (holding that the "territorial jurisdictional issue is a factual determination which is within the province of the jury to resolve under appropriate instructions" and that "[w]e agree with the weight of authority that th[e] territorial jurisdictional issue must be proved beyond a reasonable doubt"); *McKinney v State*, 553 NE2d 860, 863 (Ind App, 1990) (observing that "the State must prove territorial jurisdiction beyond a reasonable doubt" to the trier of fact); *Sheeran v State*, 526 A2d 886, 890 (Del, 1987) (holding that "the State must establish that a legal situs of the offense was in Delaware" and that the reviewing court is required to determine whether "any rational trier of fact could have found [the existence of territorial jurisdiction] beyond a reasonable doubt"); *State v Beall*, 729 SW2d 270, 271 (Tenn App, 1986) (holding that "[t]he trial judge correctly instructed the jury that in resolving whether the crime occurred in Tennessee they must be persuaded beyond a reasonable doubt from the evidence introduced on that issue"); *State v Svenson*, 104 Wash 2d 533, 542; 707 P2d 120 (1985) (stating that territorial jurisdiction "must be proved beyond a reasonable doubt and the burden of proof is on the State"); *People v Cullen*, 695 P2d 750, 751 (Colo App, 1984) (stating that "[w]here determination of jurisdiction depends upon a resolution of disputed facts, the issue must be submitted to the jury with an appropriate instruction"); *People*

v Holt, 91 Ill 2d 480, 492; 440 NE2d 102 (1982) (holding that, in the absence of a statutory presumption that a murder occurred in Illinois when the body is found inside the state, "[j]urisdiction must be proved beyond a reasonable doubt"); *State v Batdorf*, 293 NC 486, 494; 238 SE2d 497 (1977) (holding that "when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused"); *State v Baldwin*, 305 A2d 555, 559 (Me, 1973) (observing that "the State has the burden of proving beyond a reasonable doubt that the criminal conduct it seeks to vindicate occurred in the State of Maine"); *Commonwealth v Bighum*, 452 Pa 554, 559; 307 A2d 255 (1973) (observing that "in those infrequent cases where jurisdiction depends upon the resolution of disputed facts, it is within the province of the jury to resolve the issue under proper instructions, and failure to give such instructions may constitute reversible error").

We adopt this majority rule and hold that when the matter of territorial jurisdiction is placed in issue in a given case—and assuming that the trial court has determined that the facts to be offered by the prosecution, if proven, would be legally adequate to confer jurisdiction under MCL 762.2—the prosecution must prove to the trier of fact beyond a reasonable doubt that the alleged act, consequence, or other condition that would confer territorial jurisdiction under MCL 762.2 has in fact occurred within the state of Michigan. Requiring the trier of fact to find beyond a reasonable doubt that one of the statutory jurisdiction-conferring acts, consequences, or conditions has occurred within this state is consistent with the general rule that all controverted factual issues in a criminal case must be found beyond a reasonable doubt. See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

And the mere fact that the Legislature has not defined the existence of territorial jurisdiction as an "element" of a criminal offense does not compel a contrary conclusion. See *Apprendi v New Jersey*, 530 US 466, 494-496; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (observing that a sentencing factor, which increases the punishment for a crime beyond the prescribed statutory maximum, must be proven to the trier of fact beyond a reasonable doubt even though the legislature had not defined the factor as an "element" of the offense).[5]

We find further support for our holding in this regard by looking to Michigan's venue jurisprudence. To be sure, territorial jurisdiction and venue are two different concepts. See 21 Am Jur 2d, Criminal Law, § 461, p 588; see also *McLaughlin*, 80 NY2d at 471. "[J]urisdiction

[5] Although some courts do not consider the existence of territorial jurisdiction to be an actual element of the criminal offense, see, e.g., *Butler*, 353 Md at 79 n 5; *Willoughby*, 181 Ariz at 538; *Baldwin*, 305 A2d at 558, other courts treat territorial jurisdiction as an essential element of the crime itself, see, e.g., *Liggins*, 524 NW2d at 184; *Sheeran*, 526 A2d at 890. We think the better rule is *not* to treat territorial jurisdiction as an essential element of the crime because Michigan has no statute expressly defining territorial jurisdiction as an essential element of a criminal offense. Cf. Model Penal Code (ULA), § 1.13(9)(e), p 91 (defining "jurisdiction" as an " 'element of an offense' "). Accordingly, although it is a necessary part of the prosecution's case, and must be proven beyond a reasonable doubt when placed in issue, we conclude that territorial jurisdiction is not an essential element of a criminal offense in this state. We find support for this conclusion in Michigan's venue jurisprudence. See *People v Meredith (On Remand)*, 209 Mich App 403, 408; 531 NW2d 749 (1995) (stating that "while venue is a part of every criminal case that must be proven by the prosecutor, it is not an essential element of a crime"); *People v Swift*, 188 Mich App 619, 620; 470 NW2d 491 (1991) (observing that "[v]enue, although a necessary portion of the prosecution's case, is not an element of a crime"). However, we also recognize that the difference between territorial jurisdiction and the essential elements of a criminal offense is an "elusive distinction" because both territorial jurisdiction and the essential elements must be proven before the state can punish the allegedly criminal conduct. See *Apprendi*, 530 US at 494.

refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the place where the prosecution is to be brought or tried." Anno: *Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt*, 67 ALR3d, § 2[a], p 991. Indeed, "[v]enue assumes the existence of jurisdiction." 77 Am Jur 2d, Venue, § 2, p 632.

Michigan courts have long held that even though venue is not an essential element of a criminal offense, *People v Meredith (On Remand)*, 209 Mich App 403, 408; 531 NW2d 749 (1995), the determination of venue is a question of fact for the jury, *People v Watson*, 307 Mich 596, 603; 12 NW2d 476 (1943); *People v Belanger*, 120 Mich App 752, 757; 327 NW2d 554 (1982), and the existence of venue "must be proved by the prosecutor beyond a reasonable doubt," *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004); see also *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). It would be illogical to conclude that whereas the nonjurisdictional issue of venue must be proven to the trier of fact beyond a reasonable doubt, the more foundational issue of territorial jurisdiction, when in dispute, could be established by a lower or less stringent evidentiary standard.

We also conclude that, like venue, the existence of territorial jurisdiction may be proven by circumstantial evidence. See *People v Andrews*, 360 Mich 572, 575; 104 NW2d 199 (1960); *People v Sparks*, 53 Mich App 452, 460; 220 NW2d 153 (1974). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Although territorial jurisdiction is not, strictly speaking, an "element" of a crime, we perceive no reason why

circumstantial evidence should not be admissible to prove that one of the statutory jurisdiction-conferring acts, consequences, or conditions of MCL 762.2 has occurred within this state.

Turning to the present case, we note that the trial court did not make an initial legal determination whether the evidence to be presented by the prosecution, if proven, would be sufficient to confer territorial jurisdiction under MCL 762.2. But on review de novo, *Alex*, 460 Mich at 21; *Coutu*, 459 Mich at 353, we conclude that this question clearly should have been answered in the affirmative. Among other things, the prosecution proposed to offer evidence that at least one element of felony murder and at least one element of premeditated murder had been committed within this state. Such evidence certainly would have been sufficient, if proven, to establish territorial jurisdiction under MCL 762.2(1)(a).

Moving to the factual step of the inquiry—whether the alleged jurisdiction-conferring acts, consequences, or conditions in fact occurred within this state—we first conclude that the proofs sufficiently established that defendant premeditated and deliberated the victim's murder while he was physically present in the state of Michigan. The evidence showed that defendant was angry with the victim, who had changed her mind about allowing him to drive with her to Florida. The evidence also showed that defendant made essential preparations for the crime while present in this state, such as acquiring the Channellock pliers used to kill the victim and planning to take the victim across the state line into Indiana. There was more than sufficient evidence from which the jury could have found that defendant planned the murder and selected the murder weapon in Michigan. "Prior planning denotes premeditation and deliberation," *People v Hamp*, 110 Mich App 92, 103;

312 NW2d 175 (1981), and premeditation and deliberation are essential elements of premeditated murder, MCL 750.316(1)(a); *Marsack*, 231 Mich App at 370-371. We conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant committed at least one element of premeditated murder in this state. See *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992).

Similarly, there was sufficient evidence for the jury to find beyond a reasonable doubt that defendant committed at least one element of felony murder in the state of Michigan. Both larceny and kidnapping are specifically enumerated predicate felonies of felony murder, MCL 750.316(1)(b), and the commission or attempt to commit one of the enumerated predicate felonies is an essential element of the crime of felony murder, *Smith*, 478 Mich at 318-319; *Carines*, 460 Mich at 758-759.

As already noted, the evidence tended to show that defendant planned to remove the victim from this state while he and the victim were still in Michigan. The testimony established that both defendant and the victim were present at the apartment complex in St. Joseph County on the very day of the victim's disappearance. The medical evidence showed that the victim died in the Indiana cornfield, just across the state line, on or about that same day. Pursuant to the version of the kidnapping statute in effect at the time of the victim's death, kidnapping could be accomplished by, among other things, "forcibly carry[ing] or send[ing] [a] person out of this state" or "forcibly seiz[ing] or confin[ing], or . . . inveigl[ing] or kidnap[ping] any . . . person with intent to extort money or other valuable thing thereby[.]" Former MCL 750.349;[6]

[6] The text of MCL 750.349 was amended by 2006 PA 159, which took effect on August 24, 2006. But the proofs established that the offenses committed in this case occurred on or about September 20, 2005. We look

see also *People v Wesley*, 421 Mich 375, 382; 365 NW2d 692 (1984). After a thorough review of the trial testimony, and bearing in mind that "[c]ircumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime," *Jolly*, 442 Mich at 466, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant kidnapped the victim while in this state by forcibly removing her from Michigan to Indiana. Likewise, a rational trier of fact could have found beyond a reasonable doubt that defendant inveigled or kidnapped the victim while in Michigan with the intent to extort[7] her money or automobile. In short, there was sufficient evidence presented at trial from which a rational jury could have found beyond a reasonable doubt that defendant committed at least one essential element of felony murder in this state. See *Wolfe*, 440 Mich at 515-516.[8]

In sum, the trial court should have initially determined as a matter of law that the prosecution's proposed evidence—namely, that at least one element of felony murder and at least one element of premeditated

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to the language of the kidnapping statute in effect at the time the instant offenses were committed. See *People v Schumacher*, 276 Mich App 165, 167 n 2; 740 NW2d 534 (2007).

[7] The word "extort" is defined merely as "[t]o gain by wrongful methods; to obtain in an unlawful manner; to exact wrongfully by threat or intimidation." Black's Law Dictionary (7th ed).

[8] Alternatively, with respect to the charges of both premeditated murder and felony murder, a rational trier of fact could have concluded beyond a reasonable doubt that the victim "reside[d] in this state . . . at the time the criminal offense [was] committed" within the meaning of MCL 762.2(1)(d). Indeed, the undisputed evidence established that the victim was a resident of St. Joseph County, Michigan, at the time of her death. However, as we explain in part II(E) of this opinion, we are not persuaded that the exercise of territorial jurisdiction under MCL 762.2(1)(d), on the basis of the victim's residency alone, would pass constitutional muster.

murder had been committed within this state—would have been sufficient, if proven, to confer territorial jurisdiction under MCL 762.2(1)(a). Upon such a determination, any controverted factual issues bearing on the existence of territorial jurisdiction should have been submitted to the jury in the same manner as any other jury-submissible issue of fact. As noted, there was ample evidence presented at trial from which the jury could have found beyond a reasonable doubt that defendant committed at least one element of felony murder and at least one element of premeditated murder in this state.[9] Accordingly, even though the evidence suggested that the fatal blows were struck in Indiana, and despite the discovery of the victim's body in Indiana, the trial court had territorial jurisdiction to try defendant for murder under the laws of Michigan. MCL 762.2(1)(a) and (2)(a).[10]

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[9] Lest there be any confusion on the matter, we wish to make clear that if the jury had determined that none of the alleged jurisdiction-conferring acts, consequences, or conditions had occurred in Michigan, there would have been no territorial jurisdiction to try defendant in Michigan under Michigan's first-degree murder statute. But in such a case, the constitutional protection against double jeopardy would not have barred the state of Indiana or the federal government from charging and trying defendant for the same criminal conduct. *Heath v Alabama*, 474 US 82, 89-90; 106 S Ct 433; 88 L Ed 2d 387 (1985). The United States Supreme Court "has plainly and repeatedly stated that two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Id*. at 92 (emphasis in original). "[A] single act constitutes an 'offence' against each sovereign whose laws are violated by that act." *Id*. at 93; see also *Smith*, 478 Mich at 322 (observing that "a defendant who commits one criminal act that violates the laws of two different sovereigns has committed two different offenses for double jeopardy purposes").

[10] Of course, if a trial court determines after viewing the evidence in a light most favorable to the prosecution that no rational trier of fact could find that the alleged jurisdiction-conferring acts, consequences, or conditions of MCL 762.2 occurred in this state, the trial court may take the issue from the jury and decide the factual issues bearing on territorial

E

Defendant also contends that his trial under Michigan's substantive criminal law violated due process. We cannot agree. It does not appear that our courts have yet decided the extent to which the Due Process Clause may limit the application of Michigan's criminal law to conduct occurring partially outside this state. But it is well settled in the civil context that the Due Process Clause forbids a state from applying its own substantive law to a transaction or occurrence in which the state has insufficient interests or with which the state has insufficient contacts. See *Sutherland v Kennington Truck Service, Ltd*, 454 Mich 274, 287; 562 NW2d 466 (1997); see also *Olmstead v Anderson*, 428 Mich 1, 30 n 13; 400 NW2d 292 (1987). Indeed, "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins Co v Hague*, 449 US 302, 310-311; 101 S Ct 633; 66 L Ed 2d 521 (1981).

On the other hand, a state may constitutionally apply its own law if the state "ha[s] a significant contact or significant aggregation of contacts, creating state interests, such that [application] of its law is neither arbitrary nor fundamentally unfair." *Id*. at 313; see also *Phillips Petroleum Co v Shutts*, 472 US 797, 818-819; 105 S Ct 2965; 86 L Ed 2d 628 (1985). Albeit in the context of federal territorial jurisdiction rather than state territorial jurisdiction, the principles announced in *Hague* and *Shutts* have been extended to the criminal-law setting. See, e.g., *United States v Yousef*, 327 F3d 56, 111 (CA 2, 2003); *United States v Davis*, 905 F2d 245, 248-249 (CA 9, 1990); *United States v*

jurisdiction as a matter of law. This would be tantamount to a directed verdict for the defense. See, e.g., *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

Shahani-Jahromi, 286 F Supp 2d 723, 727 (ED Va, 2003). The United States Court of Appeals for the Second Circuit has observed that " '[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.' " *Yousef*, 327 F3d at 111, quoting *Davis*, 905 F2d at 248-249. This "nexus requirement . . . appears to take into consideration factors comparable to the analysis articulated by the Supreme Court in *Hague* in the state choice of law context by ensuring a sufficient tie to the United States rendering application of United States law inoffensive to fundamental principles of due process." *Shahani-Jahromi*, 286 F Supp 2d at 727-728.

Relying in part on the United States Supreme Court's decision in *Strassheim*, the United States Court of Appeals for the Eleventh Circuit has denied habeas corpus relief for a criminal defendant who claimed "that his prosecution in Alabama for a murder in Georgia offend[ed] various due process concepts which limit the territorial reach of state criminal prosecutions." *Heath v Jones*, 941 F2d 1126, 1138 (CA 11, 1991). The court held that because a portion of the crime had occurred in Alabama, and had "directly violated the peace, tranquility, and laws of Alabama," the state had "established a sufficient nexus" and could constitutionally exercise jurisdiction over the offense. *Id*. at 1139.

As discussed earlier, the jury was instructed in the present case that "the prosecutor must also prove beyond a reasonable doubt that [the victim] was a resident of the State of Michigan, St. Joseph County, at the time of her death, *and* that the Defendant committed some act toward the commission of the crime while

within the State of Michigan, County of St. Joseph . . . ." (Emphasis added.) We find it necessary to point out that this instruction did not comport with the actual statutory text of MCL 762.2. The trial court unnecessarily instructed the jury that it was required to find *both* that the victim resided in the state of Michigan *and* that the offense was partially committed in this state. MCL 762.2(1) is written in the disjunctive, and purports to confer territorial jurisdiction if *any one* of the conditions listed in subsections 1(a) through 1(e) has been satisfied. Accordingly, the requirements of MCL 762.2 would have purportedly been satisfied upon proof *either* that defendant "commit[ted] a criminal offense . . . partly within this state," MCL 762.2(1)(a), *or* that the "victim of the offense . . . reside[d] in this state . . . at the time the criminal offense [was] committed," MCL 762.2(1)(d). Stated another way, the prosecution could have ostensibly satisfied the requirements of MCL 762.2 by proving *either one* of these factors, and would not have been required to prove *both* that the victim resided in this state *and* that the offense was partially committed in this state.[11]

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[11] The trial court's instruction to the jury was technically erroneous in another respect as well. MCL 762.2 does not confer territorial jurisdiction merely because a defendant has "committed some act toward the commission of the crime while within the State of Michigan," as the trial court instructed. Instead, MCL 762.2 confers territorial jurisdiction if, among other things, a defendant "commits a criminal offense wholly or partly within this state" or a defendant's "conduct constitutes an attempt to commit a criminal offense within this state." MCL 762.2(1)(a) and (b). The statute goes on to provide that "[a] criminal offense is considered under [MCL 762.2(1)(a)] to be committed partly within this state" only if "[a]n act constituting an element of the criminal offense is committed within this state," or if "[t]he result or consequences of an act constituting an element of the criminal offense occur within this state," or if "[t]he criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being

Because it is undisputed that the victim was a resident of the state of Michigan at the time of her death, it might appear at first blush that statutory jurisdiction could have been established on the basis of the victim's residency alone. See MCL 762.2(1)(d) (purporting to confer territorial jurisdiction whenever "[a] victim of the offense . . . resides in this state . . . at the time the criminal offense is committed"). However, we are not persuaded that the exercise of territorial jurisdiction on the basis of the victim's residency alone would have passed constitutional muster. Indeed, as the United States Supreme Court has concluded, "nominal residence—standing alone—[is] inadequate" to justify the choice of one state's law over that of another state. *Hague*, 449 US at 311; see also *Home Ins Co v Dick*, 281 US 397, 408; 50 S Ct 338; 74 L Ed 926 (1930). Accordingly, it does not appear that the exercise of territorial jurisdiction under MCL 762.2(1)(d), solely on the basis of the victim's residency, would have withstood constitutional scrutiny. See *Hague*, 449 US at 311; *Dick*, 281 US at 408.

Nonetheless, we conclude that the exercise of territorial jurisdiction under MCL 762.2(1)(a) was constitutional. Quite apart from the victim's residency, the proofs established that at least one essential element of both felony murder and premeditated murder was actually committed within the state of Michigan. As explained in more detail previously, the evidence pre-

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defrauded or otherwise harmed." MCL 762.2(2)(a), (b), and (c). Therefore, the trial court erred by instructing the jury that it was merely required to find that defendant had "committed some act toward the commission of the crime while within the State of Michigan . . . ." Nevertheless, we find this error harmless in light of the fact that there was sufficient evidence presented at trial from which the jury could have concluded beyond a reasonable doubt that defendant committed at least one essential element of felony murder and at least one essential element of premeditated murder in this state.

sented at trial showed that defendant premeditated the killing, kidnapped the victim, and selected the murder weapon in Michigan. In light of the fact that at least one essential element of each charged crime was committed within this state, we have no difficulty concluding that there was "a significant contact or significant aggregation of contacts" so that application of Michigan's criminal law was "neither arbitrary nor fundamentally unfair." *Hague*, 449 US at 313. Moreover, we also conclude that defendant's conduct "directly violated the peace, tranquility, and laws" of Michigan, and that this state therefore had "a sufficient nexus" with the conduct so as to permit the constitutional exercise of territorial jurisdiction. *Heath*, 941 F2d at 1139. The application of Michigan's first-degree murder statute to defendant's conduct fully comported with the constitutional guarantee of due process.

F

Relying on *United States v Cabrales*, 524 US 1; 118 S Ct 1772; 141 L Ed 2d 1 (1998), defendant also suggests that venue was not proper in St. Joseph County, Michigan, because his trial was not conducted in the district and vicinage where the crime was committed. It is true that the United States Constitution guarantees the right to be tried in the proper venue in the context of federal prosecutions. *Id*. at 6. Indeed, "Article III, § 2, cl 3 instructs that 'Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed' " and "the Sixth Amendment calls for trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' " *Id*. [12] However, " 'these provisions apply only to pros-

[12] The Michigan Constitution of 1963 contains no similar venue or vicinage requirement. It is true that a vicinage requirement did appear in

ecutions in Federal courts.' " *People v Lee*, 334 Mich 217, 224; 54 NW2d 305 (1952) (citation omitted); see also *Caudill v Scott*, 857 F2d 344, 345-346 (CA 6, 1988); *Cook v Morrill*, 783 F2d 593, 595-596 (CA 5, 1986); *People v Pascarella*, 92 Ill App 3d 413, 417-418; 415 NE2d 1285 (1981). Accordingly, in this state prosecution, defendant had no federal constitutional right to be tried in a certain venue or vicinage.

The Michigan Legislature has provided that "[w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any 1 of said acts was committed." MCL 762.8. The determination of venue is a question of fact for the jury, *Watson*, 307 Mich at 603; *Belanger*, 120 Mich App at 757, and the existence of venue "must be proved by the prosecutor beyond a reasonable doubt," *Webbs*, 263 Mich App at 533. As noted previously, there was sufficient evidence presented at trial from which the jury could have concluded beyond a reasonable doubt that defendant committed at least one element of premeditated murder and at least one element of felony murder in St. Joseph County, Michigan. Consequently, venue was proper in St. Joseph County. MCL 762.8.

III

Defendant also argues that the photographs of the victim were gruesome and that their prejudicial effect substantially outweighed any probative value. There-

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the Michigan Constitution of 1835, but that requirement was omitted from the Michigan constitutions of 1850 and 1908. *People v Lee*, 334 Mich 217, 225; 54 NW2d 305 (1952). A vicinage requirement was also omitted from the 1963 constitution. "The evident purpose" of omitting the vicinage requirement from these later constitutions was "to permit the legislature some latitude in legislating as to venue of criminal cases." *Id*.

fore, he contends that the trial court abused its discretion by admitting the photographs into evidence. We cannot agree.

A decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Gregory*, 21 Mich App 76, 78; 174 NW2d 905 (1969).

Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403. *Unger*, 278 Mich App at 257. " 'Photographs may . . . be used to corroborate a witness' testimony,' and '[g]ruesomeness alone need not cause exclusion.' " *Id*., quoting *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995).

In the case at bar, defendant's intent was directly in issue because it was an essential element of premeditated murder and felony murder. The photographs were helpful in proving defendant's intent to kill because they illustrated the nature and extent of the victim's injuries. See *Unger*, 278 Mich App at 257; see also *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997). The photographs were also helpful in explaining and corroborating the witnesses' testimony concerning the victim's cause of death. Photographs may properly be used to corroborate other evidence and are not excludable simply because they are cumulative of a witness's oral testimony. *Mills*, 450 Mich at 76. The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself. *Id*. at 72-73. The photographs admitted in this case specifically corroborated the testimony concerning the cause of the victim's death and the nature and extent of her fatal injuries. We conclude that the photographs were relevant because the issue of

defendant's intent to kill was of consequence to the determination of the action, and a finding of intent to kill was made more probable by the nature and extent of the injuries as depicted in the photographs. MRE 401; *Mills*, 450 Mich at 66-68.

We also conclude that the photographs were highly probative and that their probative value was not outweighed by the danger of undue prejudice. MRE 403. Although certain of the pictures appear gruesome, their admission was helpful in proving that the victim had been intentionally killed and in corroborating the trial testimony. As already noted, " '[g]ruesomeness alone need not cause exclusion.' " *Unger*, 278 Mich App at 257, quoting *Mills*, 450 Mich at 76. We cannot say that the probative value of the photographs was substantially outweighed by the danger of undue prejudice. *Unger*, 278 Mich App at 257. The trial court did not abuse its discretion by admitting the photographs into evidence.

Affirmed.

PEOPLE v PATTON

Docket No. 283921. Submitted July 15, 2009, at Detroit. Decided July 30, 2009, at 9:05 a.m.

Joseph A. Patton was in a federal prison when the Oakland County Prosecuting Attorney lodged a detainer for an untried embezzlement charge against him. The defendant eventually pleaded no contest to the embezzlement charge in the Oakland Circuit Court on the condition that he be allowed to appeal, and the court, Steven N. Andrews, J., sentenced him to 23 months to 10 years of imprisonment. The defendant appealed by leave granted.

The Court of Appeals *held*:

1. The federal authorities' failure to timely inform the defendant of the detainer violated article III(c) of the Interstate Agreement on Detainers (IAD), MCL 780.601. However, because the IAD mandates a dismissal in only three circumstances and none of them involves a violation of article III(c), the defendant is not entitled to have his conviction vacated or the embezzlement charge dismissed.

2. The defendant was not denied his constitutional right to a speedy trial. The defendant argued that the 3½-year delay between the date of the criminal complaint and arrest warrant against him and the date the detainer was lodged was sufficient to show a constitutional violation. However, the time for judging whether the right to a speedy trial has been violated runs from the date of arrest, and the defendant's claim was based on a period of delay that preceded his arrest.

3. The defendant was not denied due process because of prearrest delay. The defendant did not show actual and substantial prejudice to his right to a fair trial, nor did he show an intent by the prosecution to gain a tactical advantage, with respect to the delay.

4. The defendant is not entitled to credit against his sentence for embezzlement for time served from the date a detainer could have been lodged against him. Under MCL 769.11b, a defendant is only entitled to sentence credit for time served as a result of being denied or unable to furnish bond for the offense of which the

defendant is convicted. The defendant properly received credit for time served from the date he was transferred to the custody of Michigan authorities for proceedings on the embezzlement charge of which he was convicted.

Affirmed.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, and *Janice A. Kabodian*, Assistant Prosecuting Attorney, for the people.

Bart R. Frith for the defendant.

Before: TALBOT, P.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM. Defendant appeals by delayed leave granted his conditional no-contest plea to embezzlement of over $20,000, MCL 750.174(5)(a). Defendant was sentenced to 23 months to 10 years' imprisonment. Defendant was not "promptly inform[ed]" when the prosecution lodged a detainer against him. However, because the Interstate Agreement on Detainers does not provide for dismissal of a criminal charge for a violation of Article III(c), defendant is not entitled to have his conviction vacated and the embezzlement charge dismissed. In addition, defendant was not denied his constitutional right to a speedy trial, nor was he denied due process because of prearrest delay. Defendant is also not entitled to sentence credit for time served from the date a detainer could have, or was, lodged against him. Accordingly, we affirm defendant's conviction and his sentence.

I. SUMMARY OF THE FACTS

From January 1, 2002, to June 30, 2002, defendant embezzled more than $20,000 from Federal Mogul. In

October 2002, a criminal complaint was filed in Oakland County and a warrant was issued for defendant's arrest; however, the prosecution was not able to locate defendant.

The prosecution eventually learned that defendant was incarcerated in a federal penitentiary in Kentucky and lodged a detainer against him on February 23, 2006. However, federal authorities failed to inform defendant of the detainer until August 28, 2006, at which time defendant requested a final disposition of the embezzlement charge. Defendant was transferred to the custody of Michigan authorities on November 6, 2006. After the trial court denied defendant's motion to dismiss, defendant pleaded no contest to the embezzlement charge. Defendant reserved the right to appeal the trial court's order denying his motion to dismiss.

II. INTERSTATE AGREEMENT ON DETAINERS

Defendant asserts that his conviction must be vacated and the embezzlement charge dismissed because of a violation of the Interstate Agreement on Detainers (IAD), MCL 780.601. Specifically, defendant contends that because the federal authorities failed to timely inform him of the detainer, he was prevented from demanding a speedy resolution of the charge. We disagree. The interpretation and application of a statute is a question of law that we review de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

" 'Forty-eight States, [including Michigan,] the Federal Government, and the District of Columbia . . . have entered into the Interstate Agreement on Detainers . . . .' " *People v Swafford*, 483 Mich 1, 8; 762 NW2d 902 (2009), quoting *Alabama v Bozeman*, 533 US 146, 148; 121 S Ct 2079; 150 L Ed 2d 188

(2001). The purpose of the IAD is to facilitate the prompt disposition of outstanding charges against an inmate incarcerated in another jurisdiction. *People v Meyers (On Remand)*, 124 Mich App 148, 154; 335 NW2d 189 (1983). "Once a detainer is filed, it is then that the IAD is triggered and compliance with the provisions of the agreement is required." *People v Gallego*, 199 Mich App 566, 574; 502 NW2d 358 (1993).[1]

Article III(c) of the IAD provides:

> The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

It is uncontested that defendant was not notified of the February 2006 detainer until August 28, 2006. We agree with defendant that because he was not informed of the detainer until six months after it was lodged against him, he was not "promptly inform[ed]" of the detainer.

The IAD expressly requires dismissal of a criminal charge in three circumstances:

> (1) if, after a prisoner has made the required request pursuant to Article III, trial does not occur within the required 180 days;
>
> (2) when trial does not occur before the prisoner, having been transferred to the receiving state, is sent back to the sending state; or

[1] There is no exact definition of the term "detainer," but "it has generally been recognized to mean written notification filed with the institution in which a prisoner is serving a sentence advising that the prisoner is wanted to face pending charges in the notifying state." *Gallego*, *supra* at 574. The prosecution does not dispute that it lodged a detainer against defendant on February 23, 2006.

> (3) when the receiving state fails or refuses to accept temporary custody of the prisoner. [*Lara v Johnson*, 141 F3d 239, 243 (CA 5, 1998), mod 149 F3d 1226 (CA 5, 1998).]

See Articles IV(e) and V(c) of the IAD; see also *Swafford*, *supra* at 3-4 (the IAD requires dismissal of the charge when the prosecution fails to bring the defendant to trial within 180 days of receiving the defendant's request for a final disposition). However, "[t]he IAD does not expressly provide for a remedy in cases involving a violation of Article III(c)." *People v Marshall*, 170 Mich App 269, 277; 428 NW2d 39 (1988); see also *United States v Lualemaga*, 280 F3d 1260, 1264 (CA 9, 2002).

In *Schin v State*, 744 SW2d 370 (Tex App, 1988), the defendant, who was incarcerated in an Arizona prison when he received a warrant from Texas for his arrest, argued that the Texas indictment should be dismissed because Arizona authorities, contrary to Article III(c) of the IAD, failed to provide him with the necessary forms to request a final disposition of the indictment. The Texas Court of Appeals, after surveying relevant case-law, concluded:

> [T]he receiving state's charges should not be dismissed except as expressly allowed under the IAD. Inasmuch as the legislature chose to specify situations when dismissal is the appropriate remedy, the courts should not expand that relief to cover possible procedural errors made by another state's prison officials. . . . Although we may sympathize with appellant, we find no authority in the statute to warrant dismissal of the Texas offenses. [*Id.* at 374.]

The Fifth Circuit Court of Appeals, in *Lara*, *supra* at 243 n 4, agreed with the reasoning in *Schin*. It stated that "dismissal because of negligence on the part of the sending state is not a part of the IAD," and, therefore, it "agree[d] . . . that it would be inappropriate for the

federal courts to judicially expand the list of situations in which dismissal is dictated." *Id.* at 243. The Sixth, Eighth, Ninth, and Eleventh circuits have also held that because the IAD expressly mandates dismissal in only three circumstances, which do not include a sending state's violation of Article III(c), dismissal is not an appropriate remedy for such a violation. *United States v Robinson*, 455 F3d 602, 606 (CA 6, 2006); *United States v Walker*, 255 F3d 540, 542-543 (CA 8, 2001); *Lualemaga*, *supra* at 1263-1265; *United States v Pena-Corea*, 165 F3d 819, 821-822 (CA 11, 1999).[2]

The construction of the IAD presents a federal question. *People v Bowman*, 442 Mich 424, 428; 502 NW2d 192 (1993). We are not bound by the decisions of the Fifth, Sixth, Eighth, Ninth, and Eleventh circuits, *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004), in determining whether the failure of federal authorities to "promptly inform" defendant of the detainer requires us to vacate his conviction and dismiss the embezzlement charge. However, we may follow the decisions of lower federal courts if we find the analyses and conclusions persuasive. *Id*. at 607. The decisions from the five federal circuits comport with our rules of statutory interpretation. See, e.g., *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004) (if the language of a statute is clear and unambiguous, the Legislature is presumed to have intended its plain meaning and we must enforce the statute as written); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (we may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the stat-

[2] See also, e.g., *State v Reynolds*, 218 Neb 753, 761-762; 359 NW2d 93 (1984); *Commonwealth v Gonce*, 320 Pa Super 19, 28; 466 A2d 1039 (1983); *State v Clark*, 222 Kan 65, 68-69; 563 P2d 1028 (1977).

ute). Consequently, we find the analyses and conclusions of the five federal circuits persuasive, and we choose to follow them. Because the IAD expressly provides for the remedy of dismissal for certain violations but not for a violation of Article III(c), defendant is not entitled to have his conviction vacated and the embezzlement charge dismissed.[3]

III. SPEEDY TRIAL

Defendant next argues that he was denied his constitutional right to a speedy trial. Specifically, defendant contends that the 3½-year delay from October 2002, when the prosecution filed a criminal complaint against him and an arrest warrant was issued, until February 2006, when the prosecution lodged a detainer, is sufficient to show a constitutional violation. Defendant also contends that although prejudice is presumed because of the length of the delay, he suffered actual prejudice to his person and to his defense.[4] However, defendant is mistaken in asserting that the relevant delay for determining whether he was denied a speedy trial began when the criminal

[3] We note that this Court has previously addressed whether a violation of Article III(c) requires dismissal of a criminal charge. See *Marshall*, *supra*; *People v Office*, 126 Mich App 597; 337 NW2d 592 (1983); *People v Bentley*, 121 Mich App 36; 328 NW2d 389 (1982). However, because the opinions in those cases were issued before November 1, 1990, they are not binding precedent. MCR 7.215(J)(1).

[4] The United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). In determining whether a defendant has been denied the right to a speedy trial, a court must consider and balance: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant. *Id*. at 261-262. Prejudice is presumed where the delay is 18 months or more, and the prosecutor has the burden to show that there was no injury. *Id*. at 262. Where the delay is less than 18 months, the defendant must prove prejudice. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

complaint and arrest warrant were issued and ended when the detainer was lodged. "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006), citing *United States v Marion*, 404 US 307, 312; 92 S Ct 455; 30 L Ed 2d 468 (1971); see also *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). Here, the time frame relied on by defendant preceded his arrest on November 6, 2006. Consequently, the 3½-year period that defendant uses to claim a speedy trial violation is not recognized as a period during which a speedy trial violation occurs. Nor may the events that occurred during that period form the basis for establishing prejudice to defendant. Defendant has not established that he was denied a speedy trial.

IV. DUE PROCESS

Defendant next argues that the prosecution's "lack of a diligent investigation" into his whereabouts denied him due process, because he was not able to exercise his right to a speedy trial or to procure defense witnesses. We disagree. Constitutional questions are reviewed de novo. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).[5]

> Mere delay between the time of the commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested. Rather, the guideline is whether the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process. [*People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979) (citations omitted).]

[5] To the extent that defendant is arguing that because he was denied a speedy trial, he was necessarily denied due process, the argument is without merit. Defendant was not denied a speedy trial.

"Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000), overruled in part on other grounds *People v Miller*, 482 Mich 540 (2008). Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected. *People v Adams*, 232 Mich App 128, 135; 591 NW2d 44 (1998). " '[A]ctual and substantial' prejudice requires more than generalized allegations." *Id.* If a defendant demonstrates prejudice, the prosecution must then persuade the court that the reason for the delay sufficiently justified whatever prejudice resulted. *People v Cain*, 238 Mich App 95, 109; 605 NW2d 28 (1999).

Defendant has presented no evidence that the delay by the prosecution in learning his whereabouts was an attempt to gain a tactical advantage. Moreover, defendant only generally alleges that the prearrest delay prevented him from contacting former, unnamed coworkers because his former employer was no longer in business and its headquarters had been vacated. However, defendant does not provide any detail on the substance of any possible defense to the embezzlement charge, nor does he provide any detail regarding how his former coworkers could have supported a defense. By not identifying any specific prejudice, defendant has not established "actual and substantial" prejudice. Accordingly, defendant was not denied due process because of the prearrest delay.[6]

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[6] Defendant also argues that the 3½-year delay should have resulted in the loss of jurisdiction by the trial court. Defendant relies on *People v Dubis*, 158 Mich App 504; 405 NW2d 181 (1987). However, *Dubis* is

V. SENTENCE CREDIT

Finally, defendant argues that he is entitled to credit for time served from the date a detainer could have been lodged against him. Defendant claims that this date is October 25, 2002, when the warrant for his arrest was entered into the Law Enforcement Information Network (LEIN). At the very least, defendant claims that he is entitled to credit for time served from February 23, 2006, the date plaintiff lodged a detainer against him. We disagree. We review de novo a defendant's claim that he is entitled to sentence credit. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

A defendant is only entitled to sentence credit for time served as a result of being denied or unable to furnish bond "for the offense of which he is convicted." *People v Adkins*, 433 Mich 732, 742, 746; 449 NW2d 400 (1989); *People v Prieskorn*, 424 Mich 327, 343-344; 381 NW2d 646 (1985). When a defendant is incarcerated in another jurisdiction, "whether a hold has, or could have, entered against the defendant is irrelevant for purposes

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inapposite to the present case. In *Dubis*, the trial court lost jurisdiction to sentence the defendant because, contrary to statute, the trial court delayed the defendant's sentencing for more than one year. *Id.* at 506-507. The delay of which defendant is complaining did not occur between the date of his no-contest plea and his sentencing date. Defendant's argument is without merit.

of determining how much time the defendant has served 'for the offense of which he is convicted.' " *Adkins*, *supra* at 748.

Defendant received 113 days' credit for time served from November 6, 2006, the date he was transferred to the custody of Michigan authorities, to February 27, 2007, the date he was sentenced. Before November 6, 2006, defendant was in the custody of federal authorities for his conviction of bank robbery. His incarceration in the federal penitentiary was not the result of his being denied or unable to furnish bond for the embezzlement charge. Accordingly, defendant is not entitled to sentence credit for time served from the date a detainer could have, or was, lodged against him. *Id.*[7]

Affirmed.

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[7] Defendant also claims that sentence credit, even if not specifically authorized by MCL 769.11b, may be awarded on "a due process theory." However, a review of the three cases cited by defendant shows that none of the three defendants was awarded sentence credit under a due process theory. In *People v Parshay*, 104 Mich App 411, 414-418; 304 NW2d 593 (1981), and *People v Cohen*, 35 Mich App 706, 708-709; 192 NW2d 652 (1971), sentence credit was awarded under a "liberal" construction of MCL 769.11b. The Supreme Court rejected this "liberal" construction of MCL 769.11b in *Adkins* and *Prieskorn*. In *People v West*, 100 Mich App 498, 500-501; 299 NW2d 59 (1980), the Court's discussion about sentence credit is dictum, because the Court held that the trial court, by improperly delaying sentence, lost jurisdiction to sentence the defendant.

THE CADLE COMPANY v CITY OF KENTWOOD

Docket No. 279430. Submitted December 3, 2008, at Lansing. Decided July 30, 2009, at 9:10 a.m.

The Cadle Company, Roswell Properties, LLC, Ltd, and New Falls Corporation brought an action in the Kent Circuit Court against the city of Kentwood, the 68B District Court, and a judge of that district court, seeking a writ of superintending control compelling the defendants to process small claims judgments obtained by the plaintiffs by assignment. The circuit court, James R. Redford, J., granted summary disposition for the defendants and dismissed the complaint, ruling that MCL 600.8407(1) precludes the assignment of small claims judgments, that the plaintiffs lacked standing to challenge the constitutionality of MCL 600.8407(1), and that the plaintiffs had waived their rights to challenge the validity of MCL 600.8407(1). The plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 600.8407(1) provides that a claim shall not be filed or prosecuted in the small claims division by an assignee of a claim or by a third-party beneficiary under a third-party beneficiary contract. In *In re Goehring*, 184 Mich App 360 (1990), the Court of Appeals decided that the term "prosecution," as used in MCL 600.8408(1), which prohibits attorneys from prosecuting small claims actions in a representative capacity, applies to all stages of small claims proceedings, including postjudgment proceedings. In light of *Goehring*, MCL 600.8407(1) must be construed to prohibit assignees from participating in all stages of small claims proceedings, including postjudgment proceedings, and to bar the assignment of small claims judgments.

2. The plaintiffs have standing to challenge the constitutionality of MCL 600.8407(1). They would have an injury in fact if they are not permitted to pursue postjudgment enforcement actions and collect on the small claims judgments they obtained by assignment, there would be a causal connection between the defendants' actions and the plaintiffs' injury, and the plaintiffs' injury would be redressed by a favorable decision by the Court of Appeals.

3. The defendants failed to demonstrate that the plaintiffs had

knowingly and intentionally waived the right to challenge the constitutionality of MCL 600.8407(1).

4. MCL 600.8407(1) is constitutional. It is rationally related to the legitimate governmental interest of promoting the efficient and inexpensive resolution of small claims, is not vague inasmuch as it provides fair notice of the conduct it regulates, and does not interfere with the plaintiffs' property rights or liberty to enter into contracts.

Affirmed.

JUDGMENTS — DISTRICT COURTS — SMALL CLAIMS DIVISION — ASSIGNMENTS OF SMALL CLAIMS JUDGMENTS.

An assignee of a small claims judgment is statutorily barred from prosecuting a claim in the small claims division of district court at all stages of small claims proceedings, including postjudgment collection proceedings (MCL 600.8407[1]).

Steven E. Bratschie & Associates, P.C. (by *Scott Mancinelli* and *Daniel J. Gunn*), for the plaintiffs.

Law, Weathers & Richardson, P.C. (by *Michael J. Roth* and *Les Morant*), for the defendants.

Before: SAAD, C.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. Plaintiffs appeal as of right the circuit court's June 27, 2007, order granting summary disposition in favor of defendants (collectively referred to as "the district court"), ruling that MCL 600.8407(1) and *In re Goehring*, 184 Mich App 360; 457 NW2d 375 (1990), preclude assignees from participating in all stages of prosecution in a small claims case, including postjudgment proceedings. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiffs, Ohio corporations or limited liability companies, are factoring and financing companies that purchase large packages of individual notes and judgments from banks. According to plaintiffs, banks sell

nonperforming loans in large packages worth millions of dollars because the banks do not have the time or expertise to process them. In this case, plaintiffs paid Fifth Third Bank valuable consideration for numerous small claims court judgments. In order to obtain writs, garnishments, and executions against property in connection with these judgments, plaintiffs had to file the assignments of these claims with the appropriate district court.[1] Plaintiffs submitted to the district court four assignments of small claims judgments, but the district court refused to process them.

Plaintiffs filed a complaint in the circuit court seeking a writ of superintending control under MCR 3.302 compelling the district court to process the assignments. Plaintiffs requested that the circuit court determine whether MCL 600.8407(1) and *Goehring* were applicable to the assignment of small claims judgments and, if so, that the court declare MCL 600.8407(1) unconstitutional on the grounds that it is vague and ambiguous, not rationally related to a legitimate governmental interest, deprives plaintiffs of their liberty to contract and property rights without due process of law, and amounts to a taking without just compensation. MCL 600.8407(1) is in chapter 84 of the Revised Judicature Act (RJA), MCL 600.101 *et seq*., and provides that "[a] claim shall not be filed or prosecuted in the small claims division by an assignee of a claim or by a third party beneficiary under a third party beneficiary contract."

The district court filed a motion to dismiss pursuant to MCR 3.302, for summary disposition pursuant to MCR 2.116(C)(8) and (10), and for sanctions pursuant to MCR 2.114. The district court argued that in *Goehring*, *supra* at 364, this Court interpreted the term "prosecution," as

[1] "A small claims division is created in each district as a division of the district court." MCL 600.8401.

used in MCL 600.8408(1),[2] and concluded that the term was not restricted to any stage of the proceedings. Therefore, when a party elects to proceed in the small claims division, it voluntarily surrenders its right to counsel at all stages of the proceedings, including postjudgment proceedings. *Goehring*, *supra* at 365. According to the district court's argument, MCL 600.8407(1) likewise prohibits the assignment of claims during prosecution, including postjudgment proceedings. The district court maintained that plaintiffs' right to challenge MCL 600.8407(1) was waived when Fifth Third Bank elected to proceed in the small claims division, and that regardless of the waiver, the statute is constitutional.

In opposing the motion, plaintiffs sought to distinguish *Goehring* from the instant case because *Goehring* did not address MCL 600.8407(1), or whether assignees may collect judgments for their own benefit, without the assistance of counsel. Plaintiffs considered the prosecution of small claims to be completed once judgments were entered, and asserted that they were merely attempting to collect the judgments. Plaintiffs further claimed that they did not waive their constitutional challenge of the applicable statute because they had no notice that assignment would be prohibited, and allowing assignment of judgments was consistent with the purpose of the statutory scheme for the small claims division: to promote the efficient and inexpensive resolution of small claims.

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[2] MCL 600.8408(1) provides:

> An attorney at law, except on the attorney's own behalf, a collection agency or agent or employee of a collection agency, or a person other than the plaintiff and defendant, except as is otherwise provided in this chapter, shall not take part in the filing, prosecution, or defense of litigation in the small claims division.

The circuit court opined that in light of this Court's interpretation of the term "prosecution" in MCL 600.8408(1), as analyzed in *Goehring*, the term "prosecuted" in MCL 600.8407(1) should be interpreted in the same manner. Thus, the circuit court concluded that assignees are precluded from being involved in all stages of small claims court proceedings, including postjudgment proceedings. The circuit court reasoned that the specification in MCL 600.8408(2),[3] requiring a person with direct knowledge to pursue a small claim, indicated the Legislature's intent to "keep these things short, to the point, sweet, and finite." The circuit court noted that in electing to pursue a claim in the small claims division, the parties waived certain rights, as set forth in MCL 600.8412.[4] Fifth Third Bank elected its remedy and waived its ability to assign.

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[3] MCL 600.8408(2) provides:

> A sole proprietorship, partnership, or corporation as plaintiff or defendant may be represented by an officer or employee who has direct and personal knowledge of facts in dispute. If the officer or employee who has direct and personal knowledge of facts in dispute is no longer employed by the defendant or plaintiff or is medically unavailable, the representation may be made by that person's supervisor, or by the sole proprietor, a partner, or an officer or a member of the board of directors of a corporation.

[4] MCL 600.8412 provides:

> Unless a party removes a small claims action to the district court pursuant to [MCL 600.8408(4)], all parties to an action in the small claims division shall be considered to have waived the right to counsel, the right to trial by jury, the right to recover more than the applicable jurisdictional amount as prescribed by [MCL 600.8401], and any right of appeal, except that if the action is heard before a district court magistrate pursuant to [MCL 600.8427], the parties have a right to an appeal to the small claims division of the district court as provided by [MCL 600.8427]. The affidavit prescribed in [MCL 600.8402] shall contain a statement that the plaintiff understands that he or she has waived these rights.

With respect to plaintiffs' constitutional challenge of MCL 600.8407(1), the circuit court held that the statute was a reasonable provision rationally related to the economic administration of the civil justice system where there are small claims, that it was not vague, ambiguous, or arbitrary, and that it did not cause a taking of private property without just compensation because the law was in effect long before plaintiffs purchased the judgments and parties are presumed to know the law. The circuit court further ruled that plaintiffs did not have standing pursuant to MCL 600.8408, that the judgment could not be assigned pursuant to MCL 600.8407(1), and that when the case was submitted to the small claims division, the parties waived any other requirements or difficulties pursuant to MCL 600.8412. The circuit court granted the district court's motions to dismiss and for summary disposition,[5] but denied its request for sanctions. The circuit court stated that it could not reasonably conclude that plaintiffs' claims were frivolous in light of the fact that other district courts permitted the assignment of small claims in similar circumstances.[6] This appeal followed.

II. ASSIGNMENT OF SMALL CLAIMS JUDGMENTS

Plaintiffs first argue that the trial court erred by determining that MCL 600.8407(1) and *Goehring* pre-

[5] The circuit court's June 27, 2007, order grants the district court's motion to dismiss pursuant to MCR 3.302 and motion for summary disposition pursuant to MCR 2.116(C)(10); it makes no mention of MCR 2.116(C)(8).

[6] Plaintiffs have followed the same procedure in other district courts in Michigan and contend that their requests to file assignments of small claims judgments have been routinely granted. In preparing for this case, plaintiffs surveyed all the other district courts in Michigan, inquiring whether they would accept and file assignments of small claims judgments. According to plaintiffs, 15 of the district courts that responded indicated that they accept and process assignments of small claims judgments.

clude the assignment of small claims judgments. Plaintiffs contend that MCL 600.8407(1) does not expressly prohibit assignees from pursuing collections on small claims judgments. Rather, it merely bars an assignee from filing or prosecuting a small claims action before obtaining a judgment. According to plaintiffs, a distinction between prejudgment and postjudgment actions is acknowledged in MCR 4.301, which addresses the applicability of other court rules after judgment. Plaintiffs further contend that this Court's interpretation of the word "prosecution" in MCL 600.8408(1), as addressed in *Goehring*, does not apply to the term "prosecuted" in MCL 600.8407(1) and, alternatively, that *Goehring* was wrongly decided. We disagree.

A. STANDARD OF REVIEW

"The grant or denial of a petition for superintending control is within the sound discretion of the court. Absent an abuse of discretion, this Court will not disturb the denial of a request for an order of superintending control." *Goehring*, *supra* at 366. A court does not abuse its discretion in refusing to grant a writ of superintending control where the party seeking the writ fails to establish grounds for granting a writ. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 347; 675 NW2d 271 (2003). "For superintending control to lie, the petitioners must establish that the respondents have failed to perform a clear legal duty *and* the absence of an adequate legal remedy." *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993) (emphasis in original).

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v*

Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999). When ruling on a motion brought under MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006); MCR 2.116(G)(6). Summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id*. The interpretation of a statute is a question of law that we review de novo. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006).

B. ANALYSIS

This case presents an issue of first impression with respect to the interpretation of MCL 600.8407(1) and whether its prohibition against assignees filing or prosecuting claims in the small claims division includes postjudgment proceedings. As previously stated, MCL 600.8407(1) provides that "[a] claim shall not be filed or prosecuted in the small claims division by an assignee of a claim or by a third party beneficiary under a third party beneficiary contract." The parties dispute the meaning of the term "prosecuted" as used in the statute.

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first step is to examine the plain language of the statute itself. The Legislature is presumed to have intended the meaning it plainly expressed. If the statutory language is clear and unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed, and further judicial construction is not permitted. [*McElhaney ex rel McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493; 711 NW2d 795 (2006) (citations omitted).]

In *Goehring*, *supra* at 364, this Court interpreted the meaning of the term "prosecution" as used in MCL 600.8408(1), a different provision of the same act. In that case, the plaintiff wished to have counsel represent him in postjudgment proceedings in connection with a small claims judgment against him. *Goehring*, *supra* at 362. When the district court noted its disinclination to permit representation by counsel, the plaintiff filed a complaint for a writ of superintending control in the circuit court, asserting that MCL 600.8408(1) and MCL 600.8412 were inapplicable after judgment is entered. *Id.* at 362-363. The circuit court dismissed the complaint. *Id.* at 363.

As previously stated, MCL 600.8408(1) provides:

> An attorney at law, except on the attorney's own behalf, a collection agency or agent or employee of a collection agency, or a person other than the plaintiff and defendant, except as is otherwise provided in this chapter, shall not take part in the filing, prosecution, or defense of litigation in the small claims division.

The *Goehring* Court noted that the terms "prosecution" and "litigation," as set forth in MCL 600.8408(1), were used "without limitation to any stage of the proceedings." *Goehring*, *supra* at 364. The Court explained that "several sections of Chapter 84 refer to postjudgment collection proceedings within the small claims division, compelling the conclusion that the Legislature intended small claims 'prosecution' and 'litigation' to include postjudgment proceedings." *Id*. The provisions this Court highlighted were MCL 600.8410(2) (enforcement of installment payment judgments); MCL 600.8420(1) (fee for issuance of judgment debtor discovery subpoena); and MCL 600.8421 (taxable costs to include cost of execution upon a judgment). *Id.* The Court noted that the plaintiff "failed to demon-

strate any established usage of the terms 'litigation' or 'prosecution' to exclude postjudgment enforcement proceedings where no new action had been commenced." *Id.* The Court held that the plaintiff in *Goehring* had waived his right to counsel at all stages of the case, including judgment enforcement proceedings, when he "elected not to remove the small claims action to the district court." *Id.* at 365; see also MCL 600.8408(4). Thus, the prohibition on attorney participation in the small claims division, as set forth in MCL 600.8408(1), was also applicable in postjudgment proceedings. *Goehring*, *supra* at 365.

Pursuant to the Court's holding in *Goehring*, we conclude that the term "prosecuted," as used in MCL 600.8407(1), includes postjudgment proceedings. Identical terms in different provisions of the same act should be construed identically, *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 426 n 16; 565 NW2d 844 (1997),[7] statutory provisions must be read and interpreted as a whole, "and the meaning given to one section [must be] arrived at *after due consideration of other sections* so as to produce, if possible, an harmonious and consistent enactment as a whole," *State Treasurer v Wilson*, 423 Mich 138, 145; 377 NW2d 703 (1985) (emphasis added). Moreover, the language of the statute should be interpreted with regard to the purpose of the act. *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006). As noted by this Court, "Chapter 84 of the [RJA] sets forth the framework for the small claims division of the district court." *Goehring*, *supra* at

[7] See also *People ex rel Simmons v Munising Twp*, 213 Mich 629, 633; 182 NW 118 (1921), which stated, "It is fundamental that adoption of language requires adoption of construction. Identical language should certainly receive identical construction when found in the same act." (Quotation marks and citation omitted.)

363. The small claims division was created by the Legislature in order to provide for the settling of small sums in a convenient and economical fashion. *Schomaker v Armour, Inc*, 217 Mich App 219, 221; 550 NW2d 863 (1996). The rules of evidence, pleading, and procedure are relaxed, and there is no jury, attorney representation, or right to an appeal. *Id.* Restrictions against participation by attorneys,[8] collection agencies, and anyone other than the plaintiff and the defendant, except as otherwise provided in chapter 84, reduce the cost and complexity of litigation for all involved, and place both parties on equal footing. See MCL 600.8408(1) and (2); *Goehring*, *supra* at 365. Consequently, in light of *Goehring*, and several sections of chapter 84, we hold that MCL 600.8407(1) prohibits assignees from participating in all stages of a case brought in the small claims division, including postjudgment proceedings, thus barring the assignment of small claims judgments.

Plaintiffs argue that our Supreme Court, as demonstrated in MCR 4.301, acknowledges a distinction between prejudgment and postjudgment proceedings in the small claims division. MCR 4.301 provides: "Actions in a small claims division are governed by the procedural provisions of Chapter 84 of the [RJA] . . . and by this subchapter of the rules. After judgment, other applicable Michigan Court Rules govern actions that were brought in a small claims division." According to plaintiffs, the plain language of MCR 4.301 demonstrates that after judgment is obtained in a small claims case, other applicable court rules govern collection proceedings. Plaintiffs contend that because they are not attempting to pursue a claim but instead collect on small claims judgments already rendered, they are

[8] An attorney may participate on his or her own behalf if a party to the case. MCL 600.8408(1).

entitled to use all the enforcement mechanisms procedurally available for other judgments. This Court rejected a similar argument in *Goehring*, explaining that MCR 4.301 "merely clarifies that postjudgment enforcement procedures available in other cases are also available in small claims cases." *Id.* at 365. MCR 4.301 did not restore the plaintiff's right to counsel in postjudgment proceedings. *Id.*

Plaintiffs argue that the *Goehring* Court distinguished the right to counsel—a right that one specifically surrenders before judgment in electing to pursue a claim in the small claims division under MCL 600.8412 and does not regain after judgment under MCL 600.8408(1)—from postjudgment procedures of enforcement that are "available in other cases." *Goehring*, *supra* at 365. Plaintiffs point out that while MCL 600.8412 specifically states that the right to counsel is waived, it says nothing regarding the right to assign judgments and the assignee's right to collect on those judgments. Fifth Third Bank, as the original owner of the debts, would be allowed to pursue collection of the judgments. Thus, plaintiffs claim that they, as assignees, are merely engaging in the same postjudgment procedures allowed to Fifth Third Bank in attempting to enforce and collect the assigned judgments.

However, the judgment enforcement procedures referred to in *Goehring* and MCR 4.301 do not necessarily encompass assignments as a method of enforcing judgments. Our Supreme Court has defined "assignment" as " '*to make over or set over to another;* to transfer.' " *State Treasurer v Abbott*, 468 Mich 143, 150 n 8; 660 NW2d 714 (2003), quoting *Aultman, Miller & Co v Sloan*, 115 Mich 151, 153; 73 NW 123 (1897) (emphasis in *Abbott*). Thus, an assignment is not specifically defined as a postjudgment enforcement procedure. For

example, assignment is not included in MCL 600.8409, the provision under the small claims act governing execution, garnishment, or attachment with respect to the collection and enforcement of small claims judgments. In fact, MCL 600.8409(1) specifically states that "the judgment may be enforced in any other manner provided by law and not prohibited under the provisions of this chapter." This clause can reasonably be interpreted to mean that the prohibition against the involvement of assignees as set forth in MCL 600.8407(1) continues to apply after judgment. For the same reasons the *Goehring* Court rejected the plaintiff's attempt to create a legal distinction between prejudgment and postjudgment proceedings with respect to statutory restrictions placed on claims pursued in the small claims division, we likewise reject plaintiffs' argument in this case. Plaintiffs' dissatisfaction with MCL 600.8407(1) and its preclusion of assignees from involvement in all stages of small claims actions is a matter reserved for the Legislature, not this Court.[9]

For the reasons discussed, we conclude that the circuit court properly granted summary disposition to the district court and did not abuse its discretion in dismissing plaintiffs' complaint for a writ of superintending control because the district court did not fail to perform a clear legal duty. *In re Recorder's Court Bar Ass'n*, *supra*. Pursuant to this Court's holding in *Goehring*, *supra* at 364, the term "prosecution" in MCL 600.8408(1) applies in both prejudgment and postjudgment contexts. Therefore, we must conclude that the term "prosecuted" in MCL 600.8407(1), which is part of the same statutory scheme,

[9] We also decline to accept the district court's invitation to consider the Legislature's inaction with respect to various proposed legislative amendments as illustrative of the proper interpretation of MCL 600.8407(1). Discerning the Legislature's intentions when considering various amendments of the RJA would be speculative at best and irrelevant.

also applies in both prejudgment and postjudgment contexts. The district court properly refused plaintiffs' efforts, as assignees, to collect on the small claims judgments.

III. CONSTITUTIONALITY OF MCL 600.8407(1)

Plaintiffs next argue that MCL 600.8407(1) is unconstitutional to the extent that it precludes assignees from pursuing collection on small claims judgments because it is not rationally related to a legitimate state interest, is vague and ambiguous, and deprives plaintiffs of their liberty to contract and property rights without due process of law. We disagree. Defendants contend that the circuit court properly ruled that plaintiffs lacked standing and waived their right to challenge the constitutionality of MCL 600.8407(1) because their predecessor in interest, Fifth Third Bank, elected to pursue the subject claims in the small claims division. We disagree.

A. STANDARD OF REVIEW

Whether a party has standing in a legal matter is a question of law that we review de novo. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 291; 737 NW2d 447 (2007). Whether a party has waived its legal rights "is a mixed question of law and fact." *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). The definition of waiver is a legal issue, and whether the facts of the case amount to a waiver is a question of fact, which is reviewed for clear error. *Id*. Whether a statute is constitutional is a question of law we review de novo. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

B. STANDING AND WAIVER

Plaintiffs have standing to challenge the constitutionality of MCL 600.8407(1) if: (1) they have an "injury in fact" that is concrete and particularized, and actual or imminent; (2) there is a causal connection between their injury and the district court's action; and (3) it is likely, not merely speculative, that plaintiffs' injury will be redressed if this Court renders a favorable decision. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629; 684 NW2d 800 (2004). Plaintiffs satisfy this three-pronged test. Plaintiffs would suffer an injury in fact if they are not permitted to pursue postjudgment enforcement actions and collect on the small claims judgments they purchased from Fifth Third Bank. The district court's refusal to process their assignments prevents plaintiffs from being able to collect on the judgments, which they own. Therefore, there would be a causal connection between the district court's actions and plaintiffs' injury. Furthermore, if this Court were to grant plaintiffs a writ of superintending control, directing the district court to process the assignments, it would undoubtedly remedy plaintiffs' injury. Thus, plaintiffs have standing. *Id*.

The district court argues that plaintiffs, in "blindly" purchasing the debts from Fifth Third Bank, waived their right to challenge MCL 600.8407(1), because they stepped into the shoes of Fifth Third Bank, thereby inheriting the bank's waiver of its right to assign by electing to utilize the small claims division. Thus, according to the district court, plaintiffs have caused their own injury. However, "[w]aiver is the *intentional* relinquishment of a known right. The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to

waive." *Book Furniture Co v Chance*, 352 Mich 521, 526-527; 90 NW2d 651 (1958) (citations omitted and emphasis added). A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). The party asserting the waiver bears the burden of proof. *Burke v City of River Rouge*, 240 Mich 12, 14; 215 NW 18 (1927).

As stated earlier, the determination whether MCL 600.8407(1) precludes the assignment of small claims court judgments is a matter of first impression. Thus, when Fifth Third Bank elected to pursue the underlying claims in the small claims division, it cannot be said that it intentionally waived—in addition to waiving its right to counsel and its right to appeal under MCL 600.4812—its right to assign a judgment after the proceedings leading up to judgment were concluded. The district court points to a waiver provision contained in the affidavit and claim forms filed by Fifth Third Bank in the underlying cases; however, this provision merely states that the plaintiffs in the underlying actions, who are not parties in the instant case, waived their right to counsel. The provision says nothing with respect to waiver of the right to assignment of a small claims judgment. The district court has failed to demonstrate that Fifth Third Bank knowingly and intentionally relinquished its right to assignment.

Similarly, plaintiffs cannot be said to have known that the district court would refuse to process their assignments when they purchased the judgments from Fifth Third Bank, particularly because plaintiffs had been able to process assignments in other district courts previously. Therefore, because a waiver must occur knowingly and be intentional, plaintiffs did not waive

their right to challenge the constitutionality of MCL 600.8407(1). *Book Furniture Co*, *supra*.

C. CONSTITUTIONALITY OF MCL 600.8407(1)

Plaintiffs argue that their due process rights under the Fifth Amendment and the Fourteenth Amendment of the United States Constitution, US Const, Ams V and XIV, and the Michigan Constitution, Const 1963, art 1, § 17, would be violated if MCL 600.8407(1) were interpreted to prohibit the assignment of small claims judgments. The parties agree that the appropriate standard of review is the rational basis test because the ability of an assignee to collect a small claims judgment is an economic matter.

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. To prevail under this *highly deferential* standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. [*Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000) (citations omitted and emphasis added).]

In assessing a statute's constitutional validity, this Court "must identify the objective that the challenged statute seeks to achieve." *Phillips*, *supra* at 454. This Court has explained that the purpose of creating the

small claims division of the district court is to "effect expeditious justice." *Schomaker*, *supra* at 226. Plaintiffs do not contest that this purpose is legitimate. Rather, plaintiffs argue that the statute, as interpreted by the district court, is not rationally related to this purpose because it would actually cause the small claims system to become less efficient. According to plaintiffs, by the time of judgment, the facts have been decided and are no longer in dispute, and involvement of the original plaintiff is no longer necessary. A small claims judgment creditor would use the same procedural tools available to and employed by the original judgment holder, and it is far more efficient for the courts to have a creditor well versed in the collections process pursue collection.

While plaintiffs' argument suggests that it is perhaps an unwise or bad policy to restrict assignments of small claims judgments, a rational basis review does not test the wisdom, need, or appropriateness of the statute. *Crego*, *supra* at 260. Further, given the "highly deferential" rational basis standard of review, it cannot be said that MCL 600.8407(1) is " 'arbitrary and wholly unrelated in a rational way to the objective of the statute.' " *Crego*, *supra* at 259 (citation omitted). Limiting the involvement of those who are not the original parties at all stages of the case promotes the "expeditious" resolution of small claims and informal proceedings among the actual litigants, which are objects of the act. *Schomaker*, *supra* at 226; MCL 600.8408(1); MCL 600.8408(2). By mutually agreeing to give up certain rights in order to resolve their limited monetary dispute in the small claims division, the original parties enjoy freedom from intervention by nonparty attorneys, collection agencies, third-party beneficiaries, assignees, and others who lack personal knowledge of the case, which can reasonably be said to reduce the cost and

complexity of litigation for all involved. Finally, because MCL 600.8407(1) is presumed constitutional, this Court must use extreme caution when deciding whether it is unconstitutional; it will only be found unconstitutional when it is clearly invalid. *Phillips*, *supra* at 422-423. We do not find the statute, as interpreted, clearly invalid. Plaintiffs' assertion that the postjudgment phase in the small claims division would be inefficient without the ability to assign is unsupported by facts on the record. Thus, plaintiffs have failed to rebut the presumption of constitutionality.

Plaintiffs also weave a vagueness argument into their constitutional challenge of MCL 600.8407(1), because some district courts purportedly accept and process assignments of small claims judgments, while others do not. Plaintiffs offer little analysis in support of their argument other than citing *Smith v Goguen*, 415 US 566; 94 S Ct 1242; 39 L Ed 2d 605 (1974), and discussing the statute's vagueness in conjunction with their first constitutional challenge that the statute is arbitrary.[10] Nevertheless, we will address this issue because plaintiffs did discuss it and cite authority. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

A statute can be found unconstitutionally vague in three ways:

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[10] Plaintiffs also baldly assert that MCL 600.8407(1) is ambiguous, but provide no citation of authority, argument, or analysis. Therefore, this issue is waived.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. [*Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (quotation marks and citation omitted).]

> "A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated." [*Dep't of State v Michigan Ed Ass'n-NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002), quoting *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001).]

Plaintiffs appear to argue that the statute is vague because it does not provide fair notice of the regulated conduct. This Court should "examine[] the entire text of the statute and give[] the statute's words their ordinary meanings." *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997). Because the vagueness challenge is not based on the First Amendment, this Court examines " 'whether the statute is vague as applied to the conduct allegedly proscribed in this case,' " instead of hypothetical concerns. *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001), quoting *People v Vronoka*, 228 Mich App 649, 652; 579 NW2d 138 (1998).

The fact that district courts have handled assignments of small claims judgments in different ways is not necessarily proof that the statute is vague. The language of the statute itself does not encourage arbitrary or discriminatory enforcement.

> A word used in a statute need not have but a single meaning to pass constitutional muster. . . . When determining whether a statute is void for vagueness, the reviewing court need not set aside common sense, nor is the Legislature required to define every concept in minute detail. Rather, the statutory language need only be reasonably precise. [*Dep't of State*, *supra* at 120-121.]

As a general principle, "a failure to define a term within a statute or ordinance [here the word 'prosecuted'] does

not render the statute unconstitutionally vague, where the common meaning of the word provides both adequate notice of the conduct prohibited and of the standards for enforcement." *Belle Maer Harbor v Harrison Charter Twp*, 170 F3d 553, 558 (CA 6, 1999). As previously stated, this Court already defined the term "prosecution," as used in chapter 84, as applying to all stages of a small claims case, including postjudgment proceedings. *Goehring*, *supra* at 364. Plaintiffs' disagreement with this interpretation does not render MCL 600.8407(1) unconstitutionally vague.

Finally, we reject plaintiffs' argument that MCL 600.8407(1) interferes with their property rights or liberty to contract. In addition to being inadequately briefed and thereby waived, plaintiffs' argument lacks merit because at the time plaintiffs purchased the small claims judgments from Fifth Third Bank, this Court had already interpreted the term "prosecution," as used in chapter 84, as applying to all stages of the proceedings in the small claims division. *Id*. Plaintiffs, who are presumed to know the law, purchased the small claims judgments at their own peril.

We find that the statute is rationally related to the legitimate purpose of promoting the efficient and inexpensive resolution of small claims, is not unconstitutionally vague, and did not interfere with plaintiffs' property rights or liberty to contract. Thus, we affirm the trial court's ruling that MCL 600.8407(1) is constitutional under the Michigan and United States constitutions.

IV. CONCLUSION

The circuit court did not abuse its discretion by dismissing plaintiffs' complaint for a writ of superintending control because this Court previously inter-

preted the term "prosecution" under the statutory scheme for the small claims division to apply to every stage of the case, including postjudgment proceedings. This Court's interpretation of the term "prosecution" in MCL 600.8408(1) applies to the term "prosecuted" in MCL 600.8407(1). Further, although plaintiffs have standing and did not waive their right to challenge the constitutionality of MCL 600.8407(1), the statute is rationally related to the legitimate state interest of promoting the efficient and inexpensive resolution of small claims, is not unconstitutionally vague, and does not interfere with plaintiffs' property rights or liberty to contract.

Affirmed.

USA CASH #1, INC v CITY OF SAGINAW

Docket No. 279378. Submitted December 2, 2008, at Lansing. Decided July 30, 2009, at 9:15 a.m.

USA Cash #1, Inc., and Stretch-A-Buck Discount, licensed secondhand merchants operating in the city of Saginaw, brought an action in the Saginaw Circuit Court against the city, alleging that the city's ordinance regulating secondhand merchants' reporting of transactions to local law enforcement is preempted by the secondhand and junk dealers act, MCL 445.401 *et seq*., that the ordinance denies secondhand merchants equal protection under the law, and that the ordinance imposes an unlawful tax on secondhand merchants. The court, Robert L. Kaczmarek, J., granted summary disposition for the city. Stretch-A-Buck appealed.

The Court of Appeals *held*:

1. The city ordinance's electronic reporting requirements are additional to the requirements of the state secondhand and junk dealers act and do not conflict with the state act. Although the city ordinance contains more specific regulations than the state law regulating the same area, the laws are not contradictory in the sense that they cannot coexist and be effective. The same rationale applies to the provisions of the city's ordinance requiring secondhand merchants to report transactions to local law enforcement within 48 hours of the transaction and pay a fee of $2 for each transaction. The city's requirement that secondhand merchants report transactions within 48 hours does not directly conflict with the state statute's weekly reporting requirements. The laws can coexist and be effective. The transaction fee imposed by the city ordinance is additional to the requirements of MCL 445.405, which do not impose a fee on each transaction, and creates no conflict therewith. The trial court properly held that both acts may coexist.

2. The city ordinance does not deny secondhand merchants equal protection. A rational basis exists for subjecting secondhand merchants, but not nonprofit organizations such as Goodwill Industries International, Inc., and the Salvation Army, to the requirements of the ordinance.

3. The transaction fee is a user fee, not a tax, because the fee is voluntary, in that businesses are subject to the fee only if they engage in a certain number of transactions within a certain period, the ordinance serves a regulatory purpose, and the fee is proportional to the benefit conferred.

Affirmed.

1. STATUTES — MUNICIPAL CORPORATIONS — ORDINANCES — PREEMPTION.

A state statute preempts regulation by a municipal corporation when the local regulation directly conflicts with the statute or the statute completely occupies the regulatory field; a direct conflict exists when the local regulation permits what the statute prohibits or prohibits what the statute permits; a local regulation that regulates in an area where a state statute also regulates, with mere differences in details, is not rendered invalid due to conflict because, generally, regulation additional to that of a state law does not constitute a conflict with the state law.

2. STATUTES — MUNICIPAL CORPORATIONS — ORDINANCES — PREEMPTION.

The mere fact that the state, in the exercise of the police power, has imposed certain regulations does not prohibit a municipality from exacting additional requirements as long as there is no conflict between the two and the state statute does not provide that only its regulations apply; unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.

3. TAXATION — USER FEES — TAXES.

There are three primary criteria to be considered when distinguishing between a user fee and a tax although there is no bright-line distinction between a valid user fee and a tax: first, a user fee must serve a regulatory purpose rather than a revenue-raising purpose, although a user fee may also be used to raise money as long as it is in support of the underlying regulatory purpose; second, a user fee must be proportionate to the necessary costs of the service rendered or the benefit conferred; and, third, the fee must be voluntary in nature, meaning that the payer of the fee must be able to refuse or limit its use of the service or benefit; the three criteria must be considered in their totality rather than in isolation.

Smith Bovill, P.C. (by *Andrew D. Concannon*), for Stretch-A-Buck Discount.

Thomas H. Fancher for the city of Saginaw.

Before: SAAD, C.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. Plaintiff Stretch-A-Buck Discount appeals as of right the trial court's orders denying its motions for summary disposition and granting defendant city of Saginaw's motion for summary disposition. The trial court upheld a city ordinance regulating secondhand merchants' reporting of transactions to local law enforcement. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On June 19, 2006, the city of Saginaw enacted an ordinance, Saginaw Ordinances, title XI, § 110.25, requiring secondhand merchants to electronically report transactions in which the merchants received secondhand or used personal property to the chief of police within 48 hours of the transaction and pay a fee of $2 for each transaction. The ordinance required the merchants to electronically report transactions beginning August 1, 2006. Stretch-A-Buck and plaintiff USA Cash #1, Inc. (USA Cash), both licensed secondhand merchants in the city of Saginaw, initiated this action alleging that the ordinance is preempted by the secondhand and junk dealers act, MCL 445.401 *et seq*., and the pawnbroker act, MCL 445.471 *et seq*., denies secondhand merchants equal protection under the law, and imposes an unlawful tax on secondhand merchants.

Stretch-A-Buck and USA Cash moved for partial summary disposition pursuant to MCR 2.116(C)(9) and (10) on their claim that the ordinance is preempted by state law. In an opinion and order dated January 5, 2007, the trial court denied the motion, finding that the ordinance does not directly conflict with state law.

Thereafter, the city of Saginaw moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that the ordinance is rationally related to a legitimate governmental interest and thus does not deny secondhand merchants equal protection, and that the transaction fee imposed by the ordinance is a valid user fee. Stretch-A-Buck and USA Cash then filed a motion for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10) on their equal protection and unlawful taxation claims. In an opinion and order dated June 28, 2007, the trial court granted summary disposition in favor of the city of Saginaw pursuant to MCR 2.116(C)(10). The court reiterated its prior finding that the ordinance is not preempted by state law and additionally found that the ordinance does not deny secondhand merchants equal protection or impose an unlawful tax. Stretch-A-Buck now appeals as of right.

II. STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden*, *supra* at 119. The motion should be granted only when the claim is so legally deficient that recovery would be impossible even if all well-pleaded factual allegations were true and viewed in the light most favorable to the nonmoving party. *Id*. Likewise, a motion under MCR 2.116(C)(9) tests the legal sufficiency of a defense by the pleadings alone. *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). All well-pleaded factual allegations are accepted as true, and summary disposition is appropriate only "when the defendant's plead-

ings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id*. at 425-426. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden*, *supra* at 120. All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id*.; MCR 2.116(G)(6).

III. PREEMPTION

Stretch-A-Buck first argues that the city of Saginaw's ordinance directly conflicts with the secondhand and junk dealers act, specifically MCL 445.404 and 445.405, and is therefore preempted by state law.[1] According to Stretch-A-Buck, the ordinance is preempted to the extent it requires secondhand merchants to electronically report transactions, report transactions within 48 hours, and pay a fee of $2 for each transaction. We disagree.

A. STATUTORY INTERPRETATION

As this Court stated in *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996):

> Statutory interpretation is a question of law subject to review de novo on appeal. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the pur-

[1] Stretch-A-Buck concedes that the pawnbroker act was repealed by 2006 PA 675, effective March 30, 2007, rendering all of Stretch-A-Buck's arguments predicated on the act moot.

> pose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [Citations omitted.]

Every word or phrase of a statute should be accorded its plain and ordinary meaning, but if the Legislature's intent cannot be determined from the statute itself, this Court may consult dictionary definitions. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007).

A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field. *McNeil v Charlevoix Co*, 275 Mich App 686, 697; 741 NW2d 27 (2007), citing *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). "For purposes of preemption, a direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits." *McNeil*, *supra* at 697, citing *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977). It is well established, however, that a local ordinance that regulates in an area where a state statute also regulates, with mere differences in detail, is not rendered invalid due to conflict. *Walsh v River Rouge*, 385 Mich 623, 635-636; 189 NW2d 318 (1971). "As a general rule, additional regulation to that of a State law does not constitute a conflict therewith." *Id*. at 636 (quotation marks and citation omitted). Where no direct conflict exists, both laws stand. *Id*.

In *Rental Prop Owners Ass'n of Kent Co*, *supra* at 262, and in the cases cited therein, *id*. at 261, our

Supreme Court quoted with approval the following passage from 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409:

> "It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test *is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits*. Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden.
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> "The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription*. Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. *Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail*." [Emphasis in original, final emphasis added.]

B. THE CITY ORDINANCE

The challenged city ordinance states, in pertinent part:

(D) (1) No person shall fail to keep record of all persons with whom he or she does business and all property coming into his or her possession. All reports must be electronically transmitted to the Chief of Police. Every secondhand merchant, within forty-eight (48) hours, must transmit to the Chief of Police by means of electronic transmission through a modem or similar device in such a format that the data is capable of direct electronic entry into the Saginaw Police Department's computerized system approved by the Chief of Police for identifying secondhand or used personal property, all transactions in which the secondhand merchant received secondhand or used personal property the preceding day by pawn, trade, purchase, or consignment. A transaction reported by electronic transmission under this subsection shall not be reported on paper forms unless the Chief of Police so requests.

* * *

(3) All secondhand merchants must have the equipment installed in their place of business no later than July 31, 2006. The Saginaw Police Department will require all secondhand merchants to electronically submit data beginning August 1, 2006.

(E) (1) A fee of two dollars ($2.00) will be assessed per transaction . . . .

(2) A TRANSACTION is defined as a single buy or which may involve one or more secondhand goods or used personal property and does not include contract extensions or claims. This is a per transaction registration fee, not a per item fee included in the transaction. [Saginaw Ordinances, title XI, § 110.25(D), (E).]

C. THE STATE LAW

The Michigan Legislature has twice amended the secondhand and junk dealers act since this action was commenced. At the time Stretch-A-Buck and USA Cash

filed their complaint and the parties filed their respective motions for summary disposition, MCL 445.404 and 445.405 read, in part:

> Sec. 4. Such second hand dealer or junk dealer as defined in the preceding section shall . . . *keep a separate book* open to inspection by member of a police force, city marshal, constable or other person, *in which shall be written* in the English language at the time of the purchase or exchange of such articles, a description thereof, the name, description and residence of the person from whom the same was purchased and received, and the day and hour when such purchase or exchange was made. Each entry shall be numbered consecutively, commencing with number 1. [Emphasis added.]
>
> Sec. 5. Such articles, purchased or exchanged shall be retained by the purchaser thereof, for at least 15 days before disposing of them, in an accessible place in the building where such articles are purchased and received. A tag shall be attached to such articles in some visible and convenient place, with the number written thereupon, to correspond with the entry number in *such book*. Such purchaser *shall prepare and deliver on Monday of each* week to the chief of police or chief police officer of the city in which such business is carried on, *before 12 o'clock noon, a legible and correct copy written in the English language from such book*, containing a description of each article purchased or received during the preceding week, the hour and day when the purchase was made, and the description of the person from whom it was purchased. Such statement shall be verified by the affidavit of the person subscribing his name thereto. This section shall not apply to . . . . [Emphasis added.]

The act was subsequently amended by 2006 PA 675, effective March 30, 2007. Under that version of the act, MCL 445.404 and 445.405 read, in part:

> Sec. 4. (1) A second hand dealer or junk dealer shall post in a conspicuous place in or upon its place of business a sign having its name and occupation.

(2) A second hand or junk dealer *shall keep a separate book or other record* open to inspection by a member of a local law enforcement agency, *in which shall be written or entered* in the English language at the time of the purchase or exchange of any article a description of the article, the name, description, fingerprint, operator's or chauffeur's license or state identification number, registration plate number, and address of the person from whom the article was purchased and received, and the day and hour when the purchase or exchange was made as well as the location from which the item was obtained, if applicable. Each entry shall be numbered consecutively. [Emphasis added.]

Sec. 5. (1) The articles purchased or exchanged shall be retained by the purchaser for at least 15 days before disposing of them, in an accessible place in the building where the articles are purchased and received. A tag shall be attached to the articles in some visible and convenient place, with the number written thereupon, to correspond with the entry number *in the book or other record*.

(2) The purchaser *shall prepare and deliver on Monday of each week* to the chief of police or chief law enforcement officer of the local unit of government in which such business is carried on, *before 12 o'clock noon, a legible and correct copy written in the English language from the book or other record*, containing a description of each article purchased or received during the preceding week, the hour and day when the purchase was made, and the description of the person from whom it was purchased. The statement shall be verified by the person subscribing his or her name thereto. [Emphasis added.]

After the parties filed their briefs on appeal and argued before this Court, the act was amended by 2008 PA 428, effective April 1, 2009. MCL 445.404 and 445.405 now read, in part:

Sec. 4. (1) A second hand dealer or junk dealer shall post in a conspicuous place in or upon its place of business a sign having its name and occupation.

(2) A second hand or junk dealer *shall make and maintain a separate book or other written or electronic record*, numbered consecutively, and open to inspection by a member of a local law enforcement agency and the Michigan state police, *in which shall be written or entered* in the English language at the time of the purchase or exchange of any article a description of the article, and all of the following . . . . [Emphasis added.]

Sec. 5. (1) The articles purchased or exchanged shall be retained by the purchaser for at least 15 days before disposing of them, in an accessible place in the building where the articles are purchased and received. A tag shall be attached to the articles in some visible and convenient place, with the number written thereupon, to correspond with the entry number in *the book or other record*.

(2) The purchaser *shall prepare and deliver on Monday of each week* to the chief of police or chief law enforcement officer of the local unit of government in which that business is carried on, *before 12 noon, a legible and correct paper or electronic copy, in the English language, from the book or other written or electronic record*, containing a description of each article purchased or received during the preceding week, the hour and day when the purchase was made, the description of the person from whom it was purchased, and a copy of the documentation required under section 4 regarding the person from whom it was purchased. The statement shall be verified in a manner acceptable to the chief of police or chief law enforcement officer. [Emphasis added.]

D. ANALYSIS

As indicated, Stretch-A-Buck argues that the city of Saginaw's ordinance directly conflicts with MCL 445.404 and 445.405 to the extent that the ordinance requires secondhand merchants to electronically report transactions, report transactions within 48 hours, and pay $2 for each transaction. We find no direct conflict.

Both the city ordinance and the state statute at issue require secondhand merchants to report transactions in which the merchants received secondhand or used personal property to local law enforcement. With regard to the form of reporting, the city ordinance requires the merchants to submit the reports "by means of electronic transmission through a modem or similar device in such a format that the data is capable of direct electronic entry into the Saginaw Police Department's computerized system . . . ." Saginaw Ordinances, title XI, § 110.25(D)(1). The ordinance further provides that a "transaction reported by electronic transmission . . . shall not be reported on paper forms unless the Chief of Police so requests." *Id*.

Stretch-A-Buck asserts that the city ordinance is preempted by the secondhand and junk dealers act in that the ordinance "prohibits what the statute permits," *McNeil*, *supra* at 697, specifically the reporting of transactions on paper forms. At the time this action was commenced, the act required secondhand merchants to "keep a separate book" of transactions "written in the English language," MCL 445.404, and to report the transactions to law enforcement by delivering "a legible and correct copy written in the English language from such book," MCL 445.405. In its January 5, 2007, opinion and order, the trial court ruled that the electronic reporting requirements of the city ordinance did not directly conflict with the secondhand and junk dealers act, stating:

> [T]he secondhand and junk dealers act and the pawnbroker act] are silent as to the form in which [the] report[s] . . . are to be communicated or filed. [The statutes do] not prescribe that the reports be printed on paper, penned onto papyrus, carved into stone tablets, or otherwise set into any particular medium for conveying written information. The only apparent requirement as to the form

> of [the] reports is MCL 445.405's provision that the specified information in the weekly report is to be legibly written in the English language. Therefore, the Court finds that no direct conflict exists between the statute[s'] silence and the City's supplemental ordinance indicating that submission of the transaction reports is to be done in electronic form by computer.

We agree with the trial court that the version of the secondhand and junk dealers act in effect at the time of its decision did not specify the form in which the transactions were to be reported to law enforcement.[2] The act only required secondhand merchants to "prepare and deliver . . . a legible and correct copy written in the English language from" its "book" of transactions. MCL 445.405. While the primary definition of the term "book" is "a long written or printed work of fiction or nonfiction usu. on sheets of paper fastened or bound together within covers," *Random House Webster's College Dictionary* (2005), MCL 445.405 only required the merchants to submit "a legible and correct copy" from the book, without specifying whether the copy was to be submitted electronically or on paper. Further, while MCL 445.405 required the copy to be "written in the English language," and the primary definition of the term "write" is "to trace or form (character, letters, words, etc.) esp. on paper, with a pen, pencil, or other instrument or means," a secondary definition of "write" is "to be the author or originator of; compose." *Random House Webster's College Dictionary* (2005). The term "written" is defined as "expressed in writing (disting. from *spoken*)." *Id*. (emphasis in original). Considering the plain language of MCL 445.404 and 445.405, it was

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[2] When the trial court issued its June 28, 2007, opinion and order reiterating its prior determination that the city ordinance was not preempted by state law, the court made no mention of the March 30, 2007, amendments of MCL 445.404 and 445.405.

reasonable for the trial court to conclude that under the secondhand and junk dealers act, a secondhand merchant could submit an electronic or paper copy of its transactions, as long as the copy was legible, correct, and composed in the English language, rather than any other language.

In the amended versions of MCL 445.404 and 445.405, the Legislature made clear that secondhand merchants are permitted to keep the statutorily required information about their transactions in forms other than paper books, i.e., "sheets of paper fastened or bound together within covers," and to submit copies of the information to law enforcement electronically or on paper. The version of the secondhand and junk dealers act effective on March 30, 2007, required secondhand merchants to "keep a separate book *or other record* . . . in which shall be written *or entered*" the required information, MCL 445.404(2) (emphasis added), and "prepare and deliver . . . a legible and correct copy written in the English language from the book *or other record*" to law enforcement, MCL 445.405(2) (emphasis added). It is reasonable to conclude that by using the terms "other record" and "entered," the Legislature intended to encompass the keeping and submitting of electronic records. The current version of the secondhand and junk dealers act further clarifies this point, requiring secondhand merchants to "make and maintain a separate book *or other written or electronic record* . . . in which shall be written *or entered*" the required information, MCL 445.404(2) (emphasis added), and "prepare and deliver . . . a legible and correct *paper or electronic copy*, in the English language, from the book *or other written or electronic record*," MCL 445.405(2) (emphasis added).

Stretch-A-Buck emphasizes that while the secondhand and junk dealers act may permit secondhand

merchants to electronically report transactions, the city of Saginaw's ordinance *only* permits electronic reporting and prohibits the reporting of transactions on paper forms. Thus, according to Stretch-A-Buck, the city ordinance "prohibits what the statute permits," *McNeil*, *supra* at 697, and is therefore preempted by state law. We disagree. The city of Saginaw's electronic reporting requirements are additional to the requirements of the secondhand and junk dealers act and do " 'not constitute a conflict therewith.' " *Walsh*, *supra* at 636 (citation omitted). While the city ordinance contains more specific regulations than the state law regulating the same area, the laws are not contradictory in the sense that they cannot " 'coexist and be effective.' " *Rental Prop Owners Ass'n of Kent Co*, *supra* at 262 (citation omitted). Cf. *Detroit v Qualls*, 434 Mich 340, 345, 363-364; 454 NW2d 374 (1990) (holding that a city ordinance prohibiting the storage of more than 100 pounds of certain fireworks in a place of retail sales did not conflict with state law regulating the storage of fireworks, but containing no limit on the amount of fireworks a retailer could store).

The same rationale applies to the provisions in the city of Saginaw's ordinance requiring secondhand merchants to report transactions to local law enforcement within 48 hours of the transaction and pay a fee of $2 for each transaction. Stretch-A-Buck argues that the provisions are preempted by state law because MCL 445.405 requires secondhand merchants to report transactions on a weekly basis only and contains no reference to transaction fees. Again, we disagree. The city's requirement that secondhand merchants report transactions within 48 hours does not directly conflict with the state's weekly reporting requirements. The city ordinance simply requires more frequent reporting than the state law. There is no question that the laws can " 'coexist and be effective.' " *Rental Prop Owners*

Ass'n of Kent Co, *supra* at 262 (citation omitted). Furthermore, this Court has previously held that locally imposed fees do not conflict with state law regulating the same area merely because the state law imposes no fees. See *John's Corvette Care, Inc v Dearborn*, 204 Mich App 616, 619-620; 516 NW2d 527 (1994). The transaction fee imposed by the city ordinance in this case is additional to the requirements of MCL 445.405 and creates no conflict therewith. Because there is no direct conflict between the city of Saginaw's ordinance and the secondhand and junk dealers act, both laws stand. *Walsh*, *supra* at 636.

IV. EQUAL PROTECTION

Next, Stretch-A-Buck argues that the city of Saginaw's ordinance denies secondhand merchants equal protection under the law in that it treats similarly situated entities differently, without appropriate justification. We find no equal protection violation.

Whether a party is denied equal protection under the law is a constitutional question that is reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997), citing *People v White*, 212 Mich App 298, 304; 536 NW2d 876 (1995). In determining whether a law is constitutional, " '[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.' " *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004), quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). Ordinances enacted as an exercise of police powers are presumed to be constitutional and the burden is on the

challenger to prove otherwise. *Rental Prop Owners Ass'n of Kent Co*, *supra* at 253.

The essence of equal protection is that persons or entities under similar circumstances be treated alike. *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 17; 714 NW2d 664 (2006). When reviewing an equal protection challenge, one of three tests can be applied depending on the type of classification made by the statute or ordinance and the nature of the interest affected. *Dawson v Secretary of State*, 274 Mich App 723, 738; 739 NW2d 339 (2007), citing *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 469; 639 NW2d 332 (2001). There is no dispute that in this case, we must apply the rational basis test.

"Under the rational basis test, a [law] is constitutional if it furthers a legitimate governmental interest and if the challenged classification is rationally related to achieving that interest." *Boulton v Fenton Twp*, 272 Mich App 456, 467; 726 NW2d 733 (2006). The wisdom, need, appropriateness, and effects of the law are irrelevant. *Phillips*, *supra* at 434-435. A rational basis for a law exists when " 'any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable,' " justify the classification. *Id*. at 435, quoting *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003).

Stretch-A-Buck concedes that the challenged city ordinance is designed, at least in part, to prevent trafficking in stolen goods, a legitimate governmental interest. Stretch-A-Buck asserts, however, that no rational basis exists for treating secondhand merchants differently than similarly situated entities such as "Goodwill Industries, the Salvation Army and the like," which are not subject to the transaction fees or electronic reporting requirements of the ordinance. We

disagree. Goodwill Industries International, Inc. (Goodwill), and The Salvation Army are nonprofit organizations selling donated, primarily "low-end" goods, making it highly unlikely that the goods were stolen. There is no monetary incentive for thieves to *donate* stolen goods or for nonprofit organizations to sell them. On the other hand, secondhand merchants such as Stretch-A-Buck are for-profit businesses selling goods, some of which may be "higher end," that the merchants receive through purchase, consignment, pawn, or otherwise. Trafficking in stolen goods is much more likely to occur at a business such as Stretch-A-Buck where thieves and the business itself stand to gain from selling the goods,[3] than at a nonprofit thrift store where the merchandise is donated. Therefore, a rational basis exists for subjecting secondhand merchants to the requirements of the challenged ordinance, to the exclusion of entities such as Goodwill and The Salvation Army. Stretch-A-Buck has not been denied equal protection under the law.

V. UNLAWFUL TAX

Finally, Stretch-A-Buck argues that the $2 transaction fee imposed by the city's ordinance is a tax that violates the Headlee Amendment, Const 1963, art 9, § 31. We agree with the trial court that it is a valid user fee, not an unlawful tax.

Whether a charge is a user fee or a tax is a question of law that is reviewed de novo. *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998). The Headlee Amendment prohibits units of local government from levying any tax not authorized by law or charter without voter approval. If a charge imposed by a local

[3] To be clear, nothing in the record remotely suggests that Stretch-A-Buck deals in stolen goods.

ordinance is a user fee, and not a tax, the charge is not affected by the Headlee Amendment. *Id*. at 159. There is no bright-line distinction between a valid user fee and a tax that violates the Headlee Amendment. *Id*. at 160. "Generally, a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id*. at 161 (quotation marks and citations omitted).

There are "three primary criteria to be considered when distinguishing between a fee and a tax." *Id*. First, "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," although a fee may also be used to raise money as long as it is in support of the underlying regulatory purpose. *Id*.; *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Second, a user fee must be proportionate to the necessary costs of the service rendered or the benefit conferred. *Bolt*, *supra* at 161-162. Third, a fee must be voluntary in nature, meaning that the payer of the fee must be able to refuse or limit its use of the service or benefit. *Id*. at 162. These criteria must be considered in their totality rather than in isolation. *Id*. at 167 n 16. Accordingly, "a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee." *Graham*, *supra* at 151.

The primary purpose of the city of Saginaw's ordinance is to regulate the secondhand industry. The city has the authority, pursuant to the secondhand and junk dealers act, to license, inspect, track, and generally regulate secondhand merchants. MCL 445.401 *et seq*. Ordinances similar to the one at issue, which require secondhand merchants to be licensed, keep fingerprints and detailed records of transactions, and report transactions to law

enforcement, are designed to prevent trafficking in stolen property under the guise of a legitimate secondhand business. The city of Saginaw's ordinance provides a measure of security to secondhand merchants by ensuring that the merchant is not unknowingly trafficking in stolen property, deterring the attempted pawning of stolen property, and protecting the merchant from extending money in exchange for property that may later be confiscated by the police. We recognize that regulating the secondhand industry benefits the general public as well, and that a regulatory fee must confer a benefit " 'upon the particular people who pay the fee, not the general public . . . .' " *Westlake Transportation, Inc v Pub Service Comm*, 255 Mich App 589, 613; 662 NW2d 784 (2003), quoting *Graham*, *supra* at 151. But, a "regulatory fee can have dual purposes and still maintain its regulatory characterization." *Westlake Transportation, Inc*, *supra* at 613, citing *Graham*, *supra* at 151.

Stretch-A-Buck argues that even if the city's ordinance provides secondhand merchants with some service or benefit, the $2 transaction fee is disproportionate to the cost of the service rendered or benefit conferred. We disagree and find the reasoning of the trial court on this point persuasive. In its June 28, 2007, opinion, the court stated:

> The record here reflects that the $2.00 transaction fee is divided three ways with $0.50 being returned to the secondhand merchant for their expenses, $0.50 going to the electronic data manager for its services, and the remaining $1.00 going to the City to defray its expenses. As only 3 secondhand businesses are currently subject to the ordinance, and the 2 Plaintiffs here have not yet complied,[4] precise figures as to the amount of revenue going to the

[4] During oral arguments before this Court, counsel for Stretch-A-Buck indicated that it is now in compliance with the city's ordinance and that USA Cash is no longer operating within the city of Saginaw.

> City are unavailable. However, the affidavits of owners Jeff Stover and Joseph Beaudry aver that each year the Plaintiff businesses enter into roughly 15,000 and 11,500 transactions per year. This would translate to annual fee revenues of $26,500. Assuming that . . . the third store similarly enters into 11,500 transactions, total yearly revenues of $38,000 would flow to the City under the regulation. Such a figure is not wholly disproportionate to the salary of the City's clerical worker who receives salary and benefits "in excess of $35,000 per year" as compensation for reviewing the secondhand merchant reports complied on the database. . . . Without this essential review of the transaction information, the reports would accomplish nothing and the regulatory purpose would go unfulfilled. Therefore, the Court finds that Plaintiffs have failed to produce evidence that would support a finding that the City's share of the fee is wholly disproportionate to the cost of regulating Plaintiff businesses.

With regard to the voluntariness of the fee, the trial court sated that "[b]y the plain language of the city ordinance, the reporting requirements and attendant regulatory fee only apply to an individual or business that chooses to enter into secondhand transactions of a certain volume within a given period of time. The decision to engage in secondhand transactions at all, and the number of transactions in which to engage, is a purely voluntary decision within the complete control of an individual or business." The city ordinance specifically states that "[a] secondhand merchant need not report electronically transactions taking place at a business location where the number of transactions in each ninety (90) day period does not exceed ten (10)." Saginaw Ordinances, title XI, § 110.25(D)(2). Thus, the trial court was correct in stating that the $2 transaction fee imposed by the ordinance only applies to individuals and businesses choosing to engage in more than 10 secondhand transactions in each 90-day period and, in

that sense, the transaction fee is voluntary. We acknowledge that for the owners of Stretch-A-Buck and similarly situated businesses, secondhand transactions represent a primary source of income and reducing the number of their transactions or relocating their businesses is impracticable. Nonetheless, we must consider the three primary criteria for distinguishing between a fee and a tax in their totality, not in isolation. *Bolt*, *supra* at 167 n 16. Considering the three criteria together, particularly that the city ordinance serves to regulate the secondhand industry and the transaction fee imposed by the ordinance is proportional to the benefit conferred, we find that the transaction fee is a user fee, not a tax, and is therefore unaffected by the Headlee Amendment.

Affirmed.

ALLIANCE OBSTETRICS & GYNECOLOGY, PLC v
DEPARTMENT OF TREASURY

Docket No. 280125. Submitted January 14, 2009, at Lansing. Decided August 4, 2009, at 9:00 a.m.

Alliance Obstetrics & Gynecology, PLC, an association and a limited liability company, brought an action in the Court of Claims against the Department of Treasury after the defendant disallowed a small business tax credit claimed on the plaintiff's single business tax return. The defendant had treated the plaintiff as a corporation because the plaintiff was an association that is considered a corporation for federal income tax purposes, and the defendant had disallowed the claimed credit because its corporate officers' compensation had exceeded the limits imposed by MCL 208.36(2)(b)(*i*) for qualifying for the small business tax credit. The court, James R. Giddings, J., granted summary disposition for the plaintiff, rejecting the defendant's treatment of the plaintiff as a corporation. The defendant appealed.

The Court of Appeals *held*:

Neither the now-repealed Single Business Tax Act, MCL 208.1 *et seq*., nor federal regulations required an entity to be consistent in its self-classifications with respect to its state and federal tax filings for a given year. Furthermore, the plaintiff is a limited liability company, and limited liability companies are not corporations under Michigan law. A business entity that is not a corporation or a partnership should not be required to elect a classification that is inconsistent with its organization under state law.

Affirmed.

Honigman Miller Schwartz and Cohn LLP (by *Patrick R. Van Tiflin* and *Angela M. Brown*) for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Bruce C. Johnson*, Assistant Attorney General, for the defendant.

Before: OWENS, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM. In this statutory interpretation case, defendant appeals as of right an order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

At all times relevant to the issue in this case, plaintiff, Alliance Obstetrics & Gynecology, PLC, was a limited liability company (LLC) with its principal office located in Lansing. During the relevant tax year, plaintiff filed a Michigan single business tax (SBT) return and claimed a small business credit under MCL 208.36. According to plaintiff, it was entitled to a refund in the amount of $27,898. Defendant disagreed. For the purposes of calculating the small business credit under the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*,[1] defendant interpreted MCL 208.2(2) and MCL 208.36 as adopting the federal "check-the-box" system. This means that business entities that elect treatment as a corporation for federal income tax purposes are also treated as a corporation for the calculation of the small business tax credit. Therefore, plaintiff's election to be treated as a corporation for federal income tax purposes was a binding classification for purposes of the SBTA. Pursuant to MCL 208.36(2)(b)(*i*), a corporation whose officers earned more than $115,000 during the taxable year was not entitled to a small business tax credit. Accordingly, on the basis of defendant's calculations, plaintiff was not entitled to a credit, but subject to additional tax liability. After a series of administrative appeals, the Court of Claims granted plaintiff's motion for summary disposition, rejecting defendant's interpretation of the statutes.

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[1] The SBTA was repealed by 2006 PA 325 for tax years that begin after December 31, 2007.

This Court reviews questions of statutory interpretation de novo. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The first step in determining the intent of the Legislature is to look at the language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). The Legislature is presumed to have intended the meaning it plainly expressed, *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), and clear statutory language must be enforced as written, *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). "Where a tax statute is the object of judicial construction, 'ambiguities in the language . . . are to be resolved in favor of the taxpayer.' " *IBM v Dep't of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996), quoting *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994). However, tax statutes that grant tax credits or exemptions are to be narrowly construed in favor of the taxing authority because such statutes reduce the amount of tax imposed. *Auto-Owners Ins Co v Dep't of Treasury*, 226 Mich App 618, 621; 575 NW2d 770 (1997).

MCL 208.36 stated in relevant part:

> (2) The credit provided in this section shall be taken before any other credit under this act, and is available to any person whose gross receipts do not exceed . . . $10,000,000.00 for tax years commencing after 1991, and whose adjusted business income minus the loss adjustment

> does not exceed $475,000.00 for tax years commencing on or after January 1, 1985, subject to the following:
>
> * * *
>
> (b) A corporation other than a subchapter S corporation is disqualified if either of the following occur for the taxable year:
>
> (*i*) Compensation and director's fees of a shareholder or officer . . . exceed $115,000.00 for tax years commencing after December 31, 1997.

"Corporation" was not explicitly defined in the SBTA. Defendant argues that, pursuant to MCL 208.2(2), the Legislature adopted by reference the federal Internal Revenue Code definition of "corporation." We disagree.

Federal tax law does not allow for the classification as an LLC. 26 CFR 301.7701-2(a). Under federal tax law, businesses are treated either as corporations or partnerships. *Id.* "Corporation" is defined in 26 CFR 301.7701-2(b), in relevant part, as "an association (as determined under § 301.7701-3)." 26 CFR 301.7701-2(b)(2). 26 CFR 301.7701-3 states, in relevant part:

> (a) In general. A business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) can elect its classification for federal tax purposes as provided in this section. An eligible entity with at least two members can elect to be classified as either an association (and thus a corporation under § 301.7701-2(b)(2)) or a partnership, and an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner. Paragraph (b) of this section provides a default classification for an eligible entity that does not make an election.

In *Kmart Michigan Prop Services, LLC v Dep't of Treasury*, 283 Mich App 647; 770 NW2d 915 (2009),

Kmart Michigan Property Services (KMPS) was a wholly owned subsidiary of Kmart Corporation (Kmart) formed as an LLC in Michigan. In KMPS's federal filing, it elected to be classified as a disregarded entity; therefore, the Department of Treasury argued that KMPS was not entitled to file a separate SBT return but should be included with Kmart's SBT return. This Court disagreed, holding that "[n]either the SBTA nor the federal regulations require an entity to be consistent in its self-classifications with respect to its state and federal tax filings for a given year." *Id.* at 655. Further, this Court held "nothing in this subsection [MCL 208.2(2)] indicates that entity classification elections in the federal tax code must be carried over to an entity's SBT filing." *Id.*

In the present case, instead of electing to be classified as a disregarded entity, plaintiff elected to be classified as an association. Under federal tax law, an association is a corporation. Thus, plaintiff is classified as a corporation for federal income tax purposes. However, as this Court held in *Kmart Michigan Prop Services, LLC*, how an entity elects to be classified under the federal "check-the-box" system does not determine how it will be classified for SBT purposes. *Id.* Further, plaintiff is an LLC, and LLCs are not corporations under Michigan law. Business entities such as plaintiff that are neither a corporation nor a partnership should not be required to elect a classification inconsistent with their organization under state law. Therefore, plaintiff is not to be treated as a corporation for the purposes of calculating the small business tax credit and the income limitations under MCL 208.36(2) do not disqualify plaintiff from claiming the credit. Thus, plaintiff is entitled to receive the credit.

Affirmed.

MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INC

Docket No. 284037. Submitted June 9, 2009, at Grand Rapids. Decided August 4, 2009, at 9:05 a.m.

Miller-Davis Company, the general contractor and construction manager for the construction of a natatorium housing an indoor pool at a YMCA complex, brought an action in the Kalamazoo Circuit Court against subcontractor Ahrens Construction, Inc., and its bondsman, Merchants Bonding Company, alleging breach of contract as a result of faulty workmanship when installing a wooden roofing system covering the natatorium. Ahrens (hereafter defendant) moved for summary disposition on the basis that the action was barred by the statute of repose, MCL 600.5839. Merchants also sought summary disposition on the basis that the plaintiff failed to comply with a condition precedent to suit under the performance bond. The court, William G. Schma, J., denied both motions, but only addressed Merchants' argument. The Court of Appeals, BANDSTRA, P.J., and SAWYER and NEFF, JJ., denied the defendant's application for leave to appeal in an unpublished order, entered March 6, 2006 (Docket No. 266936). Following a bench trial after Judge Schma retired, the trial court, Gary C. Giguere, Jr., J., concluded that the defendant breached its contract with the plaintiff and that the breach caused the natatorium moisture problem that had occurred. The court awarded the plaintiff damages against the defendant for the cost of corrective work made necessary by the defendant's breach of contract and the same amount against Merchants with respect to its performance bond. The court also ruled that the plaintiff had no cause of action for contractual indemnity because no claims, suits, actions, recoveries, or demands were ever made, brought, or recovered against the plaintiff within the meaning of the indemnity clause in the parties' contract. The defendant appealed, and the plaintiff cross-appealed.

The Court of Appeals *held*:

1. The claims by the plaintiff against the defendant are barred by the statute of repose, MCL 600.5839(1), because the defendant is a contractor that made an improvement to real property and because the plaintiff filed its lawsuit against the defendant for

injury to property arising out of the defective and unsafe condition of an improvement to real property more than six years after the use or acceptance of the improvement. The resolution of this issue renders all other issues raised by the parties moot. The judgment of the trial court awarding the plaintiff damages for breach of contract must be reversed and the case must be remanded to the trial court for the entry of a judgment in the defendant's favor on all the claims against the defendant.

2. Where a component of an improvement is an integral part of the improvement to which it belongs, the component constitutes an improvement to real property. The wooden roof deck system installed by the defendant was itself an integral component of the natatorium's roof and the roof was an integral component of the building. The wooden roof deck system was a permanent addition to real property that enhanced its value, involved the expenditure of labor and money, and was designed to make the property more useful or valuable. The wooden roof deck system was an improvement to real property for purposes of MCL 600.5839.

3. The meaning of the word "injury," as used in the phrase "any injury to property" in MCL 600.5839(1), is sufficiently broad to encompass the plaintiff's claim that the defendant's defective workmanship resulted in harm or damage to the natatorium roof and was a violation of contractual rights, giving the plaintiff the right to seek damages. The statute of repose applies to all actions against a contractor based on an improvement to real property, including claims of breach of contract, breach of warranty, breach of an express promise, fraud, and misrepresentation.

4. The statute of repose is triggered by the time of occupancy, use, or acceptance of the improvement. Only one of these criteria must be met to trigger the running of the six-year period of limitations. Although the plaintiff filed its complaint within six years of the occupancy of the completed improvement, the action was not filed within six years of the use or acceptance of the improvement. The claims against the defendant are time-barred by MCL 600.5839(1).

Reversed and remanded.

1. LIMITATION OF ACTIONS — ARCHITECTS — PROFESSIONAL ENGINEERS — CONTRACTORS — WORDS AND PHRASES — IMPROVEMENT TO REAL PROPERTY.

An "improvement to real property"—for purposes of the statute pertaining to actions against architects, professional engineers, or contractors arising from an improvement to real property—is a permanent addition to or betterment of real property that enhances its value and that involves the expenditure of labor or

money and is designed to make the property more useful or valuable as distinguished from ordinary repairs; factors to consider in distinguishing between ordinary repairs and an improvement are whether a modification adds to the value of the property for the purposes of its intended use, the nature of the improvement, and its permanence (MCL 600.5839[1]).

2. LIMITATION OF ACTIONS — ARCHITECTS — PROFESSIONAL ENGINEERS — CONTRACTORS — IMPROVEMENT TO REAL PROPERTY.

A component of an improvement to real property that is an integral part of the improvement to which it belongs constitutes an improvement to real property for purposes of the statute pertaining to actions against architects, professional engineers, or contractors arising from an improvement to real property (MCL 600.5839[1]).

3. LIMITATION OF ACTIONS — ARCHITECTS — PROFESSIONAL ENGINEERS — CONTRACTORS — WORDS AND PHRASES — ANY INJURY TO PROPERTY.

The term "injury"—as used in the phrase "any injury to property" in the statute pertaining to actions against architects, professional engineers, and contractors arising from improvements to real property—is sufficiently broad to encompass a claim of defective workmanship in making an improvement to real property (MCL 600.5839[1]).

Howard & Howard Attorneys, P.C. (by *Scott Graham*), and *Scott Graham PLLC* (by *Scott Graham*) for the Miller-Davis Company.

Field & Field, P.C. (by *Samuel T. Field*), for Ahrens Construction, Inc.

Before: JANSEN, P.J., and HOEKSTRA and MARKEY, JJ.

PER CURIAM. Defendant Ahrens Construction, Inc., appeals by right the judgment entered after a bench trial for plaintiff, Miller-Davis Company, on its breach of contract claim. Plaintiff cross-appeals the trial court's entry of a judgment of no cause of action on plaintiff's claim for contractual indemnity of the amount awarded for breach of contract and its attorney

fees for this action. Ahrens (hereafter defendant) argues that the trial court clearly erred regarding several factual findings underlying the trial court's key ruling that defendant's workmanship installing a roof caused a severe condensation problem in the natatorium housing the indoor pool at a YMCA complex at Sherman Lake near Augusta, Michigan. Defendant also contends that the trial court clearly erred in calculating plaintiff's damages and prejudgment interest. Also, defendant argues that the trial court abused its discretion by not granting it a default judgment after learning during trial that plaintiff had violated a discovery order by failing to disclose the identity of an expert plaintiff had consulted during its investigation of the condensation problem. Finally, defendant argues that the trial court erred by not granting it judgment based on the statute of repose, MCL 600.5839(1). We agree. Our resolution of this issue renders all other issues moot. We reverse and remand for entry of judgment for defendant.

A. BACKGROUND AND TRIAL

Plaintiff, a general contractor and construction manager, brought this breach of contract action against subcontractor Ahrens and its bondsman, Merchants Bonding Company, alleging faulty workmanship by Ahrens when installing a wooden (Timber-Deck) roofing system covering the natatorium of a YMCA recreational complex at Sherman Lake, Augusta, Michigan. During cold weather, condensation would form and drip from the ceiling of the natatorium; the parties referred to this as the natatorium moisture problem (NMP). Plaintiff's theory of the case was that the NMP was caused by rips, tears, and missing sections of a Visqueen vapor barrier installed above the inner wood tongue and groove decking system, which was supported by a "T"

and "sub-T" superstructure, and by defendant's failing to install Styrofoam block insulation "tight" enough in rectangular cells that were formed by the T's and sub-T's. This roofing system was a last-minute cost-saving substitution for a roofing system consisting of a four-by-six inch plank ceiling, with nail-based Styrofoam insulation covered by oriented strand board (OSB or plywood), roofing felt, and a standing seam steel shell.

Defendant's theory of the case was that the NMP was the result of several design errors, the most serious of which allowed the vapor barrier covering the uninsulated tops of the T's to come in contact with cold outside air. Defendant supported its theory of the case with the testimony of an expert with a Ph.D. in engineering who specialized in building moisture problems. Defendant's expert opined that moisture from the humid pool air migrated through both the wood T's to their tops and the gaps in the tongue and groove ceiling planks, then along the underside of the vapor barrier to the top of the T's, where it condensed and fell back down through the ceiling. Defendant's expert also opined that any of the alleged defects in defendant's workmanship that plaintiff found after tearing off the outer portions of the roof actually helped prevent the NMP because it allowed moisture to escape through the airspace between the insulation and the outer roof structure. Defendant also argued that the alleged defects plaintiff found were caused by plaintiff's deconstruction of the roof.

Plaintiff theorized that the NMP was eventually "fixed" when, after a series of attempts at correcting it,[1]

[1] These attempts at solving the NMP included experimentation with building temperature and pressurization, sealing the juncture between

it deconstructed the roof system in 2003 to inspect it. Plaintiff contracted with the architect and the YMCA to perform "corrective work," which included three items that were not a part of the original plans and specifications for the roof system: (1) a spray-on rubberized waterproofing substance (Procor), (2) the sealing of any gaps between the Styrofoam block insulation and the wood "T" decking structure with spray-on, self-expanding, urethane foam, and (3) caulking the top of the T's and sub-T's with silicone, thereby sealing a polyethylene vapor barrier placed on top of the Procor. Plaintiff demanded that defendant perform the corrective work without compensation, but defendant refused because it believed that the NMP was the result of design defects, not its workmanship. At trial, defendant's expert testified that the added elements in the corrective work trapped moisture in the wooden structure of the roof facing the interior of the pool so that it would temporarily fix the condensation problem until sometime in the future when the Procor might break down, particularly at the tongue and groove gaps.

After a bench trial, the trial court concluded that Ahrens breached its contract with plaintiff, and that this breach caused the NMP. Plaintiff's damages were calculated on the basis of expenses plaintiff incurred tearing off and reinstalling the roofing system with the "corrective measures" noted above, plus 10 percent for "overhead," 15 percent for a "fee," and interest of "prime plus 2%" from December 2003 (after completion of the corrective work) to September 2007 (during trial). The trial court determined that plaintiff used Procor as a cost saving measure to mitigate its damages

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the roof and walls, installing roof ridge vents, adding vents below skylights, experimenting with ceiling fans, and additional work on the soffits. These efforts helped but did not resolve the NMP.

by avoiding completely removing the roofing system elements. Both the trial court in its opinion and findings and plaintiff in its brief on appeal fail to cite any testimony or other evidence specifically establishing a causal link between Ahrens's alleged defective workmanship and the NMP. Plaintiff's theory, which the trial court obviously accepted, appears to be based on the following logic: (1) deconstructing the roof revealed defective workmanship in the installation of the vapor barrier and insulation; (2) the corrective work was performed using Procor as a cost saving measure, and (3) after the roof was reconstructed, the NMP was solved. However, plaintiff's CEO admitted at trial that plaintiff never determined what caused the NMP. On the basis of photographs taken during plaintiff's disassembly of the roof system and good old-fashioned common sense, the trial court decided that Ahrens's poor workmanship caused the NMP.

The trial court concluded that "Ahrens materially and substantially breached [its] contract by performing the nonconforming and defective work described above, and upon notice and the opportunity, Ahrens failed to correct its work, or to otherwise cause it to come into conformance." Further, the trial court determined that plaintiff "suffered damages of $348,851.50" performing corrective work. The trial court also awarded the same amount against Merchants with respect to the performance bond it had issued.[2] The court also ruled that plaintiff had no cause of action for contractual indemnity because "no claims, suits, actions, recoveries, or demands were ever made, brought or recovered against" plaintiff within the meaning of the indemnity clause in the parties' contract. This ruling is the subject of plaintiff's cross-appeal.

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[2] Merchants did not appeal and settled with plaintiff.

B. PROCEDURAL HISTORY REGARDING THE STATUTE OF REPOSE

The statute of repose at issue, MCL 600.5839, provides, in pertinent part:

> (1) No person may maintain *any action* to recover damages *for any injury to property*, real or personal, or for bodily injury or wrongful death, *arising out of the defective and unsafe condition of an improvement to real property*, *nor any action for* contribution or *indemnity for damages sustained as a result of such injury*, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or *against any contractor making the improvement*, more than 6 years after the time of *occupancy of the completed improvement, use, or acceptance* of the improvement . . . .
>
> * * *
>
> (4) As used in this section, "contractor" means an individual, corporation, partnership, or other business entity which makes an improvement to real property. [Emphasis added.]

By the end of February 1999, defendant completed all its tasks regarding constructing the roof system, including installing all the wood parts, the vapor barrier, the T's and sub-T's, the insulation, all of which were covered by OSB nailed on top of two-by-four inch "sleepers" running perpendicular over the T's to the top ridge of the roof. Defendant asserts that the part of the roof system it constructed was a completed "improvement" within the meaning of the statute of repose, and that the statute began to run when plaintiff immediately began "using" the "improvement" by directing another subcontractor to apply roofing felt and the standing seam steel weather barrier on top of it. Defendant certified to plaintiff that it had completed its

work on the roof on April 26, 1999, and plaintiff paid defendant for this work the next day. Defendant asserts that this constituted "acceptance" by plaintiff within the meaning of the statute. A temporary certificate of occupancy was issued for the entire project on June 11, 1999.[3] Plaintiff filed its complaint in this matter on May 12, 2005, more than six years, defendant asserts, after the "improvement" it built was used and accepted by plaintiff.

Defendant moved for summary disposition under MCR 2.116(C)(7) on August 1, 2005. Defendant's argument then is identical to its argument now on appeal. Defendant Merchants also moved for summary disposition but on different grounds. Merchants argued that plaintiff failed to comply with a condition precedent to suit under the performance bond: filing suit within two years of defendant's ceasing work on the project. Both motions were argued before Judge William G. Schma.[4] By opinion and order filed November 18, 2005, Judge Schma denied both motions, but he only addressed Merchants' argument. Defendant applied for leave to appeal in this Court. This Court denied leave "for failure to persuade the Court of the need for immediate appellate review." Unpublished order of the Court of Appeals, entered March 6, 2006 (Docket No. 266936).

This case was tried in May and September 2007 before Judge Gary C. Giguere, Jr., who succeeded Judge Schma. Defendant raised the statute of repose both in closing argument and in its written submission of proposed findings of fact and conclusions of law. The trial court issued its opinion, findings of fact, and

[3] Plaintiff's exhibit 12 indicates that the YMCA advertised to conduct open house tours of the facility for the public on March 14 and April 18, 1999.

[4] Judge Schma retired before the trial of this case.

conclusions of law on December 21, 2007. Although the trial court found facts consistent with defendant's claims regarding the application of the statute of repose, the court did not address the statute of repose. Judge Giguere found that Ahrens "completed the natatorium roof by February 18, 1999. Ahrens submitted its final request for pay on April 26, 1999, and Miller-Davis paid Ahrens the very next day." The trial court also described the manner in which the roof was constructed and that another subcontractor completed the final tasks after Ahrens finished its work.

C. PRESERVATION

Generally, an issue is not properly preserved for appeal if it has not been raised in, and addressed and decided by the lower court or administrative tribunal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Here, defendant raised the statute of repose as a bar to plaintiff's claims by filing a motion for summary disposition before trial and again at trial in its closing argument and in its written submission of proposed findings of fact and conclusions of law. See *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 137-138, 139; 762 NW2d 178 (2009). Judge Schma denied defendant's motion for summary disposition without addressing MCL 600.5839. Judge Giguere also failed to specifically address the statute of repose in his findings of fact and conclusions of law after trial. "[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424,

427; 711 NW2d 421 (2006). These exceptions apply here. A party "should not be punished for the omission of the trial court." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

D. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling regarding a motion for summary disposition. *Abbott v John E Green Co*, 233 Mich App 194, 197; 592 NW2d 96 (1998). A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law. The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). The motion is properly granted when the undisputed facts establish that the moving party is entitled to immunity granted by law. *Citizens Ins Co v Scholz*, 268 Mich App 659, 662; 709 NW2d 164 (2005); *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 408; 557 NW2d 127 (1996).

A trial court's findings of fact following a bench trial are reviewed for clear error, MCR 2.613(C), and the court's conclusions of law are reviewed de novo. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). This Court will find clear error when it is "left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). The application of the law to the facts of a case is itself a question of law subject to review de novo. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996). This Court also reviews de novo issues of statutory interpretation. *Abbott*, *supra* at 198.

The primary goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the Legislature. *New Properties*, *supra* at 136. The Court must first review the language of the statute, and if it is unambiguous, must assume that the Legislature intended its plain meaning and must enforce the statute as written. *Id.*; *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39; 761 NW2d 269 (2008). Stated otherwise, the Court may read nothing into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). "A provision in a statute is ambiguous only if it irreconcilably conflicts with another provision or it is equally susceptible to more than a single meaning." *In re Lee*, 282 Mich App 90, 93; 761 NW2d 432 (2009). When an ambiguity exists in a statute, the statutory language should be construed reasonably, keeping in mind the purpose of the act. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003).

When reading a statute, the Court must assign to every word or phrase its plain and ordinary meaning unless otherwise defined in the statute, or unless the Legislature has used technical words or phrases that "may have acquired a peculiar and appropriate meaning in the law . . . ." MCL 8.3a; *Alvan Motor Freight*, *supra* at 40. Additionally, the Court may not read a word or phrase of a statute in isolation but must read each word or phrase and its placement in the context of the whole act. *Id.*; *Village of Holly v Holly Twp*, 267 Mich App 461, 470; 705 NW2d 532 (2005). Consequently, this Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun*

Valley Foods Co v Ward, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted).

E. ANALYSIS

We conclude that defendant's argument on this issue is meritorious. Because defendant is a contractor that made an improvement to real property, and because plaintiff filed its lawsuit against defendant "for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property" more than six years after the "use, or acceptance of the improvement," MCL 600.5839(1), all of plaintiff's claims against defendant are barred by the statute of repose.

MCL 600.5839 has on several occasions been subjected to judicial scrutiny. Our Supreme Court has upheld the statute as originally adopted, 1967 PA 203, against constitutional challenge that it violates due process and equal protection. *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980). The *O'Brien* Court recognized the power of the Legislature to extinguish common-law rights of action, noting, "the instant statute is both one of limitation and one of repose." *Id*. at 15. For claims accruing within the period specified, the statute acts as a statute of limitations. But beyond the statute's time parameters, it acts as a statute of repose by preventing a cause of action from ever accruing. *Id*. The *O'Brien* Court also rejected a challenge to MCL 600.5839 on the basis that it did not extend its protection to contractors. *O'Brien*, *supra* at 16-19. The Legislature subsequently added contractors and a "discovery" provision to the statute. 1985 PA 188; *Beauregard-Bezou v Pierce*, 194 Mich App 388, 391-392; 487 NW2d 792 (1992); *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 42 n 6; 709 NW2d 589 (2006).

This Court on several occasions has opined regarding the purpose of MCL 600.5839. Specifically, "[t]he purpose of the statute of repose is to shield architects, engineers, and contractors from stale claims and relieve them of open-ended liability for defects in workmanship." *Ali v Detroit*, 218 Mich App 581, 587-588; 554 NW2d 384 (1996). See also *Abbott*, *supra* at 200, quoting *Pendzsu*, *supra* at 410 ("The purpose of the statute of repose is to protect engineers, architects, and contractors from stale claims and to eliminate open-ended liability for 'defects in workmanship.' "), and *Pendzsu*, *supra* at 410 ("The purpose of Michigan's statute of repose is to shield architects, engineers, and contractors from stale claims and to relieve them of open-ended liability for defects in workmanship."). Here, plaintiff's claims against defendant, for both breach of contract and indemnity, rest on the allegation that defendant's defective workmanship on the natatorium's roof caused the NMP.

This Court has also addressed the meaning of the undefined word "improvement," as used in MCL 600.5839. In *Pendzsu*, this Court reviewed the reasoning of the Sixth Circuit Court of Appeals in *Adair v Koppers Co, Inc*, 741 F2d 111 (CA 6, 1984), which construed a similar Ohio statute of repose applicable to actions for damages " 'arising out of the defective and unsafe condition of an improvement to real property.' " *Pendzsu*, *supra* at 410, quoting *Adair*, *supra* at 112. Noting that this Court in *Fennell v Nesbitt, Inc*, 154 Mich App 644, 650-651; 398 NW2d 481 (1986), had adopted the *Adair* reasoning, the *Pendzsu* Court did also. *Pendzsu*, *supra* at 410-411. The Court concluded that an "improvement to real property" is a " 'permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the

property more useful or valuable as distinguished from ordinary repairs.' " *Pendzsu*, *supra* at 410, quoting *Adair*, *supra* at 114. In distinguishing between ordinary repairs and an "improvement," the Court further noted factors to consider are whether a modification adds to the value of the property for the purposes of its intended use, the nature of the improvement, and its permanence. *Pendzsu*, *supra* at 411. The issue before the Court in *Pendzsu* was whether the defendant's work installing industrial ovens at an automobile plant and enlarging and relining similar ovens and blast furnaces at a steel plant were improvements. The Court held that "the relining of the coke ovens and blast furnaces was 'integral' to the usefulness of the respective plants" and that therefore the statute of repose applied. *Id*. at 412.

This Court in *Travelers Ins Co v Guardian Alarm Co*, 231 Mich App 473; 586 NW2d 760 (1998), considered whether enlarging the capacity of electrical circuit panels was an "improvement" within the meaning of MCL 600.5839. The Court opined:

> An improvement is a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." The test for an improvement is not whether the modification can be removed without damage to the land, but whether it adds to the value of the realty for the purposes for which it was intended to be used. In addition, the nature of the improvement and the permanence of the improvement should also be considered. Furthermore, *if a component of an improvement is an integral part of the improvement to which it belongs, then the component constitutes an improvement to real property*. [*Travelers*, *supra* at 478 (citations omitted; emphasis added).]

The Court then held that "the new circuit panel box and transformer were integral components of an electrical system that was essential to the operation of the facility"; consequently, they were "an improvement to real property for the purposes of the statute of repose." *Id*. at 478-479.

Also, following the *Pendzsu* decision, this Court in *Abbott* rejected the plaintiff's claim that the statute applied only to the completed improvement, not the contractor's workmanship in making the improvement. *Abbott*, *supra* at 199-201. This Court observed that like statutes of limitations, the statute of repose must be construed in a manner that advances its purpose, i.e., to "protect engineers, architects, and contractors from stale claims and to eliminate open-ended liability for 'defects in workmanship.' " *Id*. at 200, quoting *Pendzsu*, *supra* at 410. The Court held that the statute protected the defendant from the plaintiff's stale workmanship claims. "Contractors would not enjoy the 'repose' that the statute intends to guarantee if plaintiffs, barred from bringing claims arising out of the finished result of an improvement, could nonetheless bring claims arising out of the construction practices employed in making the improvement." *Abbott*, *supra* at 201.

Applying the reasoning of these cases to the undisputed facts of the instant case, we conclude that defendant was a "contractor" that made an improvement to real property. Specifically, the wooden roof deck system that defendant constructed or installed, with its component parts of T's, sub-T's, vapor barrier, insulation, sleepers, and OSB, was itself an integral component of the natatorium's roof to which another subcontractor added roofing felt and an outer steel skin. The completed roof was an integral component of the building. The wooden roof deck system was a permanent addition

to real property that enhanced its value, involved the expenditure of labor and money, and was designed to make the property more useful or valuable. *Travelers*, *supra* at 478. In sum, defendant is a "contractor" who made "an improvement to real property." MCL 600.5839(4). Further, the cases reviewed suggest that plaintiff's claim against defendant for defective workmanship is within the ambit of the statute. *Abbott*, *supra* at 200; *Pendzsu*, *supra* at 410; *Ali*, *supra* at 587-588.

Plaintiff, however, argues that MCL 600.5839(1) does not apply to this case because its claim is for breach of an express promise, not for "damages for any injury to property . . . ." Plaintiff relies on *City of Litchfield v Union Constr Co*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 1997 (Docket No. 189823), which is without binding precedential authority. MCR 7.215(C)(1). Likewise, lower federal court decisions on which *Litchfield* relied lack binding authority. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). In addition, this Court has held that the term "any action" means MCL 600.5839(1) must apply to contract actions. See *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 378; 494 NW2d 1 (1992): "Because § 5839(1) refers to '*any* action to recover damages for any injury to property . . . or for bodily injury or wrongful death,' it is clear that even before the addition of § 5805(10)[5] it was not limited to tort actions, but, rather, included contract actions." (Emphasis in original.) The *Litchfield* Court, although agreeing that "any action" includes contract

[5] This subsection was added by 1988 PA 115, effective May 2, 1988. *Michigan Millers*, *supra* at 372. It is now found at MCL 600.5805(14): "The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839."

actions, still concluded that a "breach of an express promise is not a damage to property." *Litchfield*, *supra* at 8, citing *Huhtala v Travelers Ins Co*, 401 Mich 118, 128-129; 257 NW2d 640 (1977). The latter case addressed whether the three-year limitations period for negligence actions or the six-year limitations period for contract actions applied to the plaintiff's claim. One of the cases the *Huhtala* Court discussed was *Weeks v Slavik Builders, Inc*, 384 Mich 257; 181 NW2d 271 (1970), in which the Court opined that the plaintiff's breach of warranty claim was "not one for damages for injuries to property" because the property at issue, cement roofing tiles, had not been damaged but rather did not perform as had been warranted. *Weeks*, *supra* at 258. Plaintiff's claim here is not one for breach of warranty; it was for shoddy workmanship.

While the underlying claim in this case is arguably closer to the roofing tiles that did not perform as warranted in *Weeks* than to the roof that collapsed in *Michigan Millers*, we still conclude that the *Litchfield-Huhtala-Weeks* reasoning is inapposite to the present case. First, the more specific provisions of MCL 600.5839(1) apply over an arguably applicable general statute of limitations. See *Citizens Ins Co*, *supra* at 664, citing *Michigan Millers*, *supra* at 378; See also *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 6, 13; 687 NW2d 309 (2004). Indeed, despite the *Litchfield* Court's attempt to distinguish *Michigan Millers* on the basis that the plaintiff in that case conceded that its contract claim would be time-barred by the general limitations statute applicable to contract actions, the specific holding of *Michigan Millers* was that whatever legal theory the plaintiff advanced, MCL 600.5839(1) barred the claim. The *Michigan Millers* Court "conclude[d] that the Legislature's intent . . .

was to apply the statute of limitation contained in § 5839(1) to *all actions* brought against contractors on the basis of an improvement to real property, including those brought by owners for damage to the improvement itself." *Michigan Millers*, *supra* at 378 (emphasis added).

Second, the analysis of *Litchfield-Huhtala-Weeks* examines the nature of the plaintiff's claim to determine which potentially applicable statute of limitations might apply whereas MCL 600.5839(1) by its plain terms applies to "*any action* to recover damages for *any injury* to property, real or personal, . . . arising out of the defective and unsafe condition of an improvement to real property . . . ." (Emphasis added.) The terms that the Legislature used in MCL 600.5839(1) are broad and all-inclusive. Courts may consult a dictionary to learn the common and approved meaning of undefined statutory terms. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). The *Random House Webster's College Dictionary* (1992) definitions of "injury" include "harm or damage done or sustained" and "any violation of the rights, property, etc., of another for which damages may be sought." The latter definition is noted as one in "law" and seems particularly apt given that the purpose of the statute is to limit the time within which to bring legal claims for damages against the listed occupations making improvements to real property. Under these common meanings of the word "injury" as used in the phrase "any injury to property" in MCL 600.5839(1), the statute is sufficiently broad to encompass plaintiff's claim that defendant's defective workmanship resulted in harm or damage to the natatorium roof and was a violation of contract rights giving plaintiff the right to seek damages. This reading of the statute is consistent with its purpose "to protect engineers, architects, and contractors from stale claims and

to eliminate open-ended liability for 'defects in workmanship.' " *Abbott*, *supra* at 200-201 & n 2 (citation omitted); *Beauregard-Bezou*, *supra* at 393 ("the words of the statute must be construed in light of the general purpose sought to be accomplished by the Legislature"). Thus, plaintiff's claim is one for "any injury to property" within the meaning of MCL 600.5839(1); it does not matter that plaintiff's legal theory is based on an express promise when it is a claim for injury (harm or damage) to or caused by an improvement to real property a contractor has made. *Michigan Millers*, *supra* at 378. "The statute of repose applies to all actions against a contractor based on an improvement to real property, including . . . breach of contract, breach of warranty, fraud, and misrepresentation claims." *Travelers*, *supra* at 481-482.

Next, we address the question whether the six-year limitations period of MCL 600.5839(1) expired before plaintiff filed its complaint on May 12, 2005. The statute provides for three potential events that might trigger the running of its limitations period: "the time of occupancy of the completed improvement, use, *or* acceptance of the improvement . . . ." MCL 600.5839(1) (emphasis added). The Court in *Beauregard-Bezou* discussed this language, observing that "[w]here the use of the disjunctive 'or' creates ambiguity in a statute, the language of the statute must be construed to give effect to the Legislature's intent, and the words of the statute must be construed in light of the general purpose sought to be accomplished by the Legislature." *Beauregard-Bezou*, *supra* at 393. The Court noted that the words "and" and "or" are often misused in drafting statutes, but "the literal meaning of 'or' should be followed unless it renders the statute dubious." *Id*. The Court, *id*., concluded that the literal interpretation of the word "or" as used in MCL 600.5839(1) would not

render that portion of the statute dubious. Other panels of the Court have agreed with *Beauregard-Bezou*. See *Abbott*, *supra* at 204 n 6, and *Travelers*, *supra* at 481. The *Travelers* Court opined: "The statute of repose is triggered by the time of occupancy *or* use *or* acceptance of the improvement. Only one of the criteria set forth in the statute of repose must be met to trigger the running of the period of limitation." *Id*. (emphasis in original; citations omitted).

Here, the parties agree that plaintiff filed its complaint within six years following "occupancy of the completed improvement." Specifically, the parties agree that this event occurred on or after June 11, 1999, the date on which the proper authority issued a temporary certificate of occupancy and the date on which the parties agree the entire project was substantially completed. But it is undisputed, and the trial court so found, that defendant completed its work on its part of the natatorium's roof by the end of February 1999. Thereafter, the evidence clearly establishes that another contractor completed the final phase of the roof's construction by attaching the roofing felt and the standing seam steel skin. Plaintiff's exhibit 9, the minutes of a work-progress meeting on February 18, 1999, indicates that over the prior two weeks Ahrens completed its roof work at the recreational building, and that work for the next two weeks contemplated subcontractor Architectural Glass & Metals' completing the metal roof at the recreation building. We agree with defendant that this evidence establishes that the "improvement" it made, the wooden roof deck system, was completed and in "use" by plaintiff and other subcontractors who were finishing the project. Clearly, Architectural Glass & Metals was using the wooden roof deck system to install the outer steel roof covering in February 1999. Thus, the wooden deck system was in use by plaintiff as the

construction manager directing the work of the various subcontractors for the purpose of completing the entire project.

Plaintiff's contention that "use" of the "improvement" could not have occurred until after June 11, 1999, the date the temporary occupancy certificate was issued, would require one to read the statute to mean that only the owner of the real property can trigger the running of its limitations period. Although policy arguments could be advanced for or against such an interpretation of the statute, the rules of judicial construction of statutes require that statutes be enforced as written. *Alvan Motor Freight*, *supra* at 39. The triggering event of "occupancy of the completed improvement" certainly implies "occupancy" by the owner, or at least one having the right to occupy the completed improvement. But the statute does not so limit "use, or acceptance of the improvement . . . ." It is contrary to the rules of statutory construction to read into a statute a provision that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Roberts*, *supra* at 63.

Additionally, assuming that the Legislature's failure to specify whose "use" of the "improvement" triggers the running of the limitations period renders the statute ambiguous, the statute must be given a reasonable construction consistent with its purpose. See *Michigan Millers*, *supra* at 373; *Beauregard-Bezou*, *supra* at 393 ("the words of the statute must be construed in light of the general purpose sought to be accomplished by the Legislature"). "The purpose of the statute of repose is to shield architects, engineers, and contractors from stale claims and relieve them of open-ended liability for defects in workmanship." *Ali*, *supra* at 587-588. The purpose of the statute is not to protect owners; they

remain potentially liable to third parties for defects in the premises even if caused by a contractor's defective workmanship. *Id*. In light of the statute's purpose, it is reasonable to construe the word "use" in the statute as "use" of the "improvement" for its intended purpose by any lawfully authorized person or entity. So construed, the improvement that defendant made, the wooden roof system, was used by authorized persons and entities in February 1999 for the purpose intended when plaintiff and plaintiff's designated subcontractor completed the roof's construction by installing roofing felt and the outer steel skin. At the same time, plaintiff and other authorized subcontractors used the roof deck completed by defendant for the purpose intended: shielding the interior of the building and its occupants from the elements.

With respect to "acceptance of the improvement," plaintiff does not argue that it could not trigger "acceptance" under the statute, only that the facts show that it never, in fact, accepted the roof deck system that defendant constructed. Moreover, even if the owner of the improvement must trigger "acceptance," plaintiff as the general contractor-construction manager for the project was the authorized representative of the owner for purposes of supervising construction, deeming whether subcontractor work was acceptable under the subcontract's "charge-back" provision, and having the ability to withhold payment for unacceptable work. Here, the undisputed facts, and as found by the trial court, establish that defendant "completed the natatorium roof by February 18, 1999[,] . . . submitted its final request for pay on April 26, 1999, and Miller-Davis paid Ahrens the very next day." Although plaintiff asserts it never "accepted" defendant's work on the roof, plaintiff's own actions in accepting defendant's certification that the roof work had been completed, and then paying

for that work, speaks louder than its litigation denials. In sum, we conclude that the facts establish that by the end of April 1999 plaintiff's actions constituted "acceptance of the improvement" defendant made to real property triggering the running of the six-year limitations period of MCL 600.5839(1). *Travelers*, *supra* at 481.

Plaintiff misplaces reliance on foreign caselaw to argue that acceptance cannot waive its right of action on defective workmanship because such cases are not binding precedent, *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 494 n 5; 686 NW2d 770 (2004), and because they are inapposite. The cited cases essentially say that an owner's acceptance of construction work will not waive its right of action against the contractor for subsequently discovered latent defects. Plaintiff argues that public policy should preclude "acceptance" from occurring before noncompliant work is discovered. But the public policy of the state is expressed in MCL 600.5839: claims for latent defects are barred after the running of the six-year limitations period. Further, "acceptance" does not act as a waiver of the right to bring an action for defective work; it only triggers the running of the period within which such claims must be brought, after which they are barred by the statute of repose. In addition, the Legislature has weighed policy considerations regarding discovery of latent defects and provided an extended "discovery" limitations period where "the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer." MCL 600.5839(1).

On the basis of the foregoing analysis, we hold that the statute of repose with respect to the improvement

to real property that defendant made, the wooden roof deck system over the YMCA's natatorium, commenced running as a result of "use" by plaintiff, other subcontractors, or the owner, by the end of February 1999. Further, we hold that the facts establish that plaintiff "accepted" the improvement by the end of April 1999 when plaintiff accepted defendant's certification that its work on the roof had been completed and paid defendant for that work. Both these dates occurred more than six years before plaintiff filed its complaint, which states a claim "for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property" and a claim for "indemnity for damages sustained as a result of such injury . . . ." MCL 600.5839(1). Consequently, plaintiff's claims against defendant are time-barred. *Michigan Millers*, *supra* at 378; *Beauregard-Bezou*, *supra* at 394.

Because we have resolved the argument regarding the statute of repose in defendant's favor, all other issues raised in defendant's appeal and in plaintiff's cross-appeal are moot.

We reverse the judgment of the trial court awarding plaintiff damages for breach of contract. We remand this case to the trial court for entry of a judgment in defendant's favor on all of plaintiff's claims against defendant. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

PEOPLE v SMELLEY

Docket No. 274033. Submitted April 7, 2009, at Detroit. Decided May 26, 2009. Approved for publication August 13, 2009, at 9:00 a.m.

A jury in the Wayne Circuit Court, Craig S. Strong, J., convicted Jovan D. Smelley of second-degree murder, felon in possession of a firearm, possession of a firearm during the commission of a felony, and assault with intent to do great bodily harm less than murder. The defendant appealed.

The Court of Appeals *held*:

1. The trial court abused its discretion by admitting the hearsay testimony of several prosecution witnesses about statements the homicide victim had made to the witnesses before his death. The victim had told the witnesses that he had fought with the defendant and had feared the defendant because the defendant wanted to kill him. The statements do not fit the hearsay exception for statements of the declarant's then-existing state of mind, MRE 803(3). Instead, the statements are statements of memory or belief offered to prove the fact remembered or believed, which are inadmissible under MRE 803(3). The trial court's error requires a reversal because it appears more probable than not that the erroneous admission of the hearsay testimony affected the outcome of the trial, because the untainted evidence against the defendant was tenuous.

2. The trial court erred by admitting hearsay testimony by the victim's sister concerning another person's purported statement of identification. MRE 801(d)(1)(c) provides that a statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person. In this case, however, the declarant testified that he did not see the defendant shoot the victim. The trial court's error in this regard, combined with the other errors at trial, merits reversal and retrial.

3. The trial court erred by admitting prior bad acts evidence relating to the defendant's past possession of firearms. No evidence was introduced at trial that the defendant had a gun on the

night of the shooting. The prior bad acts evidence was highly prejudicial and, combined with the other errors at trial, merits reversal and retrial.

4. The trial court erroneously admitted as evidence of flight the defendant's arrest by an agent of the Drug Enforcement Administration two weeks after the homicide involved in this case. Evidence of flight is generally admissible when it is probative of a defendant's consciousness of guilt. However, mere departure from the jurisdiction does not give rise to an inference of consciousness of guilt. There was no record evidence that the defendant left the jurisdiction because he was aware of the homicide or feared being apprehended for it. Any minimal probative value as circumstantial evidence of guilt was substantially outweighed by the danger of unfair prejudice. The trial court's error in this regard, combined with the other errors at trial, merits reversal and retrial.

5. The defendant was not denied his constitutional right to a trial attorney without a conflict of interest. The record evidence does not support the defendant's claim that his attorney had a conflict of interest that affected the attorney's performance.

Reversed and remanded for a new trial.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Ana Quiroz*, Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs for the defendant.

Before: CAVANAGH, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM. Defendant appeals by right his jury convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, 750.227b, and assault with intent to do great bodily harm less than murder, MCL 750.84. We reverse and remand for a new trial.

Defendant was convicted for the murder of Lester Terrell Bridgeforth, who was shot in the back of the

neck on September 26, 2003, while driving a vehicle in which his friend, Ramon McLeod, was a passenger.

I. EVIDENTIARY ISSUES

On appeal, defendant argues that several of the trial court's evidentiary rulings constituted abuses of discretion that entitle him to a new trial. We agree. Evidentiary rulings that are preserved for appeal are reviewed for an abuse of discretion, but preliminary questions of law involving the admissibility of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

A. INADMISSIBLE HEARSAY—MRE 803(3)

First, defendant argues that he was denied a fair trial by the erroneous admission of several hearsay statements purportedly made by the victim, Bridgeforth, to other people before he was killed. We agree.

We set forth each claimed erroneous admission in turn, starting with the testimony of Bridgeforth's mother, Venetta King. The prosecution asked King: "Did your son prior to this homicide did he ever express to you any concerns that he had in terms of his state of mind?" Defense counsel objected on the ground that the question would elicit inadmissible hearsay testimony. The prosecution responded that the testimony was offered as MRE 803(3), existing state of mind, evidence and relied on the cases of *People v Fisher*, 449 Mich 441;

537 NW2d 577 (1995) (*Fisher II*), and *People v Ortiz*, 249 Mich App 297; 642 NW2d 417 (2002). The trial court overruled defendant's objection. This exchange between the prosecution and the witness followed:

> *Q*. Ms. King, did your son prior to his homicide did he express any fears or concerns or what his concerns [sic] any concerns at all regarding this person who was identified in court by the name of Jovan [defendant]?
>
> *A*. Yes.
>
> *Q*. Tell the jury, tell the Court?
>
> *A*. Well, just before he was killed he was [sic] he came into my room and my baby girl and myself was in there and he was telling us that Jovan was after him and trying to kill him and we didn't know nothing about it and he wanted me to move.
>
> *Q*. Did he say how long? Did he say why he thought Jovan was trying to kill him?
>
> *A*. No, he didn't tell me why.
>
> *Q*. Did he tell you how long he's been feeling like that?
>
> *A*. I know he was talking about the fights that they had and that was it he was just mad that day and he was telling us about we need to move and that they were trying to kill him.
>
> *Q*. Who is they?
>
> *A*. He said Jovan he kept specifically saying his name.

Bridgeforth's sister, Sabrina Bridgeforth was also asked by the prosecution, "When you learned of your brother's homicide, do you recall him expressing anything?" Defense counsel objected that such testimony would be inadmissible hearsay and the prosecution again cited the "state of mind exception." The objection was overruled and the prosecution continued:

> *Q*. When you learned of your brother's death and you have Ramon McLeod telling you Stone [defendant] did it at

the hospital, knowing now your brother has been murdered, did anything come to mind to you in terms of your brother's expression of his state of mind as it relates to Jovan Smelley?

A. Well, I know that it had in the comments of him [sic] and Stone fighting or beefing through the neighborhood.

* * *

Q. Did your brother ever express anything to you in terms of his state of mind prior to his death about this defendant and any concerns that he had regarding any [sic] him getting hurt in any way shape or form by this defendant?

A. That he disputed with him on and on and they had fights occasionally.

* * *

Q. Did your brother ever express anything further beyond that as to whether the beef or the—by the way when you talk about a beef what is that?

A. Fighting.

Q. Did your brother ever tell you that it was all over with and that he and Jovan were good friends again?

A. No, he told me that people were out here trying to kill him.

Q. And when you say, what did he say about people are trying [sic]?

A. He didn't say a name he just said that dispute or you know.

Raymond McLeod, who was with Bridgeforth when he was fatally shot, testified in response to the prosecutor's questioning, as follows:

Q. What did [Bridgeforth] tell you as to relates [sic] as to how he was getting along with Stone?

A. He just told me that he got into it with him at the gas station. At the bar I don't know. But that's what he told me.

Q. Sir, were those two separate occasions according to what he told you?

A. Yes.

Q. When you say he got into it was that a fist fight, a gun fight, or what kind of fight?

A. A fist fight.

McLeod's mother, Pamela McLeod, also testified. The following exchange between the prosecutor and the witness occurred:

Q. Prior to his death, Ms. McLeod, did [Bridgeforth] ever express to you any concern or concerns that he had regarding any one person any other human being?

A. Yes.

Q. Tell us first of all who it was that he expressed concerns about?

A. He told me that he wouldn't be living that long because he was into it with a guy named Stone.

* * *

Q. How long before you learned of [Bridgeforth's] homicide did he say that to you that he wouldn't be living very long?

A. The day before he got killed.

In response to the prosecution's questioning, Stephanie Bridgeforth, another sister of Bridgeforth, testified:

Q. Now did your brother ever express to you any concerns that he had about Stone?

A. Yes, he was scared of him because he had got into a few fights with him and he was saying that, you know, he got into the fight and he was saying to you know, quash the fight, the beef.

On appeal, the prosecution claims that all this testimony was properly admitted into evidence, arguing: "All of this challenged testimony served and was offered to show the victim's state of mind with regard to discord between himself and Defendant before he was killed, which in turn relevantly demonstrates motive for the killing." The prosecution argues, as it successfully did in the trial court, that this hearsay was not excluded by MRE 802 because it was excepted under MRE 803(3), which provides:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The prosecution relies on *Fisher II* to support its position that the hearsay evidence was admissible to establish Bridgeforth's state of mind. In that case, the defendant was accused of killing his wife. Several oral and written statements that were made by the victim about the defendant, their marriage, her relationships with other men, her future plans and intentions, and the like were admitted as evidence of her state of mind before she was killed. Several of the admissions were challenged on appeal.

The first appeal to the Supreme Court, *People v Fisher*, 439 Mich 884 (1991) (*Fisher I*), resulted in the grant of a new trial for the reason that the defendant "was denied a fair trial by the admission of hearsay evidence regarding the victim's state of mind." *Id*. In support of its holding, the Court quoted at length from *People v White*, 401 Mich 482; 257 NW2d 912 (1977), which noted particularly that the victim's state of mind

is usually only in issue in a homicide case when self-defense, suicide, or accidental death are raised as defenses to the crime. *Id.* at 504. When such a defense is raised, the *White* Court held, "it would be highly relevant for the prosecution to show that at or near the time of the decedent's death [the decedent] said something which tends to prove circumstantially that he feared the defendant, as suggesting it was unlikely that he was an aggressor; as tending to disprove a suicide bent; or as tending to disprove accidental death." *Id*. The *White* Court indicated that no such defense was raised by the defendant in that case, accordingly, the victim's state of mind was "only remotely and collaterally related to the real issues in the case." *Id*. at 505.

However, the *White* Court noted, a statement attributed to the victim "that he had an argument with [the defendant] and was frightened of him tended to relate forcefully to [the defendant's] character and the acts attributed to him, matters which were very prominently 'in issue' in the case." *Id*. The danger was obvious, the *White* Court concluded, because the jury would accept the victim's statement " 'as somehow reflecting on *defendant's* state of mind rather than the victim's—*i.e.*, as a true indication of the defendant's intentions, actions or culpability.' " *Id*., quoting *United States v Brown*, 160 US App DC 190, 198; 490 F2d 758 (1973) (emphasis in original). Thus, in *Fisher I*, even though a limiting instruction had been given to the jury, the Court held that "there was such a great likelihood of prejudice that the evidence should have been excluded because the relevance of the evidence was substantially outweighed by the prejudice. MRE 403." *Fisher I*, *supra* at 885.

Before retrial, the defendant in *Fisher* was granted an interlocutory appeal by our Supreme Court following the trial court's grant of the prosecution's motion

seeking permission to introduce into evidence certain oral and written statements made by the defendant's wife before she was killed. *Fisher II*, *supra* at 443-444, 454 n 16. The defendant appeared to argue that he would again be denied a fair trial by the admission of hearsay evidence regarding his wife's state of mind before she was killed, which it appeared the *Fisher I* Court meant to exclude from evidence. The trial court had held that statements made by the defendant's wife that were known by the defendant were not hearsay. *Id*. at 448. The *Fisher II* Court agreed, holding that such statements were not hearsay, were admissible to show the effect they had on the defendant (not to prove the truth of the matter asserted), and were relevant to the issues of marital discord, motive, and premeditation. *Id*. at 449-450.

The trial court also admitted certain undescribed statements made by the defendant's wife that were not known by the defendant on the ground that they were " 'non-hearsay circumstantial evidence as to the existence and extent of marital discord which is admissible as proof of motive for Defendant to kill his wife.' " *Id*. at 448. It does not appear that the *Fisher II* Court agreed with the trial court's reasoning, although it agreed with the ultimate conclusion, in that it held that the statements

> that were not known to the defendant about her plans to visit Germany to be with her lover and her plans to divorce the defendant upon her return are hearsay. They are admissible, however, because they satisfy the exception to the hearsay rule for "statement[s] of the declarant's then existing . . . intent, plan . . . [or] mental feeling . . . ." MRE 803(3). [*Id*. at 450-451.]

Further, the *Fisher II* Court addressed the confusion associated with its peremptory reversal order that led to

the interlocutory appeal. *Id*. at 454. In *Fisher I*, the Court ordered that " 'hearsay evidence regarding the victim's state of mind' where its 'relevance . . . was substantially outweighed by the prejudice' " was to be excluded from evidence. *Fisher II*, *supra* at 453-454, quoting *Fisher I*, *supra* at 884, 885. The *Fisher II* Court noted: "The people properly interpreted this order to mean that any of decedent wife's statements that expressed fear of the defendant, or that depicted significant misconduct of the defendant tending to show him to be a 'bad person,' were inadmissible." *Id*. at 454.

The prosecution in our case also relied on the case of *People v Ortiz* in support of its position that the disputed testimony was admissible. In *Ortiz*, *supra* at 300, a case that sets forth few background facts, the defendant was convicted of murdering his former wife. *Id*. at 300. On appeal, the defendant argued that numerous statements made by the victim before her death were improperly admitted. *Id*. at 307. The statements admitted under MRE 803(3) included that the victim was afraid of the defendant, that she thought he was stalking her, that defendant physically assaulted her and threatened to kill her. *Id*. at 307. Relying on *Fisher II*, *supra* at 448-450, the *Ortiz* Court held that the evidence was admissible. *Ortiz*, *supra* at 310.

After reviewing the relevant caselaw, we agree with this Court's holding in *People v Moorer*, 262 Mich App 64, 69; 683 NW2d 736 (2004): "We find the application of MRE 803(3) in *Fisher [II]*, *supra*, inapposite, and the perfunctory analysis of MRE 803(3) in *Ortiz*, *supra*, unhelpful in determining whether the statements at issue in this case were properly admitted." We are particularly dismayed by the lack of relevant background facts set forth in these cases. For example, in *Fisher II* the Court held that the victim's statements

that expressed fear of the defendant were not admissible. This statement, removed from the context and circumstances of relevant facts, offers little guidance. As the *Moorer* Court noted, a proper analysis of admissibility requires that the nature of each statement be considered specifically, as well as the purpose for each statement's admission. *Id*. at 66.

In *Moorer*, the defendant was convicted of first-degree premeditated murder for shooting and killing William Armour, who was dating the defendant's estranged wife. *Id*. at 65. On appeal, the key issue was "whether the trial court erred in holding that the out-of-court statements made to others by the victim were admissible pursuant to the hearsay exception for state of mind, MRE 803(3)." *Id*. at 66. In particular, five witnesses testified, generally, that Armour had told each of them that the defendant wanted to or was trying to kill him, that the defendant had threatened to kill him, and that Armour had a verbal confrontation with the defendant. *Id*. at 66-67. Like in our case, the prosecution argued that the statements were admissible pursuant to MRE 803(3), *Fisher II*, *supra*, and *Ortiz*, *supra*, and the trial court agreed. *Moorer*, *supra* at 69. With regard to *Ortiz*, this Court in *Moorer* held that "[t]he *Ortiz* opinion provides only a general, conclusory analysis of the admissibility of the various statements . . . ." *Id*. at 72. And, "[t]he fact that the statements in this case were relevant to issues of motive, deliberation, and premeditation, MRE 402, as in *Ortiz*, does not resolve the hearsay impediment." *Id*.

The defendant in *Moorer* argued that the admitted statements in part concerned Armour's state of mind, but Armour's state of mind was irrelevant. *Id*. Further, the statements that Armour had a confrontation with

the defendant, that the defendant wanted to kill him and threatened to kill him were statements of memory and belief offered to show that the "defendant had committed certain acts that were consistent with defendant's having killed Armour." *Id*. at 73. This Court agreed, holding that the statements "relate to past events and are specifically excluded under MRE 803(3) as statements of 'memory or belief to prove the fact remembered or believed . . . .' " *Id*. This Court also held that "[t]he statements in *Fisher [II]* described the intentions and plans of the declarant, not the past or presumed future actions of the defendant." *Id*. Thus, the *Moorer* Court concluded that "the trial court erred generally in admitting Armour's statements to others concerning defendant's threats and actions." *Id*. at 74.

In our case, the prosecution repeatedly questioned witnesses about their knowledge of Bridgeforth's state of mind before he was killed. The prosecution claimed in the trial court, and claims here on appeal, that Bridgeforth's state of mind was relevant to show the "discord between himself and Defendant." But, as the *White* Court noted, the victim's state of mind is usually only relevant in homicide cases when self-defense, suicide, or accidental death are raised as defenses to the crime. *Id*. at 504. Defendant's defense was that he was not the person who killed Bridgeforth. Thus, as in *White*, Bridgeforth's state of mind was not a significant issue in this case and did not relate to any element of the crime charged or any asserted defense. To the contrary, it was defendant's state of mind that was at issue in this case. To the extent that this hearsay had any relevance, it was "only remotely and collaterally related to the real issues in the case," *White*, *supra* at 505, and its probative value was substantially outweighed by its prejudicial effect. See *id*.

Even if evidence of Bridgeforth's state of mind were relevant, it would still be inadmissible. It is clear that the prosecution sought to use the contested testimony to demonstrate the truth of the facts asserted in Bridgeforth's alleged statements, i.e., that Bridgeforth had some fights with defendant, that he thought that defendant was after him, and that defendant was trying to kill him. And, ultimately, in light of the acrimony between defendant and Bridgeforth, it is likely that defendant killed Bridgeforth. In fact, throughout closing argument the prosecution repeatedly referenced the disputed testimony in association with her purported theory that "dying men speak the truth." The testimony was clearly hearsay.

Again, specifically, King testified that Bridgeforth told her that defendant "was after him and trying to kill him," and that he had fights with defendant. Sabrina Bridgeforth testified that Bridgeforth told her that he had fights with defendant and people were trying to kill him. Raymond McLeod testified that Bridgeforth told him that he had fights with defendant. Pamela McLeod testified that Bridgeforth told her that he would not be living long because he "was into it" with defendant. Stephanie Bridgeforth testified that Bridgeforth told her he was scared of defendant because he had been in some fights with him.

These contested statements constituted hearsay and they were not within the scope of the exception provided by MRE 803(3). Like in *Moorer*, *supra* at 73, Bridgeforth's statements were statements of memory or belief that were offered to prove the facts remembered or believed. In particular, the statements included that Bridgeforth and defendant had fought in the past and Bridgeforth believed that defendant was after him and was trying to kill him. These statements were

offered to prove that, consistent with this acrimonious history between Bridgeforth and defendant, it is likely that defendant killed Bridgeforth. Clearly, these statements allegedly made by Bridgeforth to his family and friends should not have been admitted into evidence either because they were irrelevant or because they constituted inadmissible hearsay. Thus, the trial court abused its discretion by admitting this testimony. See *Woodard*.

However, evidentiary error does not require reversal unless, after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight of the properly admitted evidence. MCL 769.26; MCR 2.613(A); *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001); *Lukity*, *supra* at 495. In this case, we conclude that this threshold for reversal has been met.

The untainted evidence in support of the prosecution's theory that defendant shot and killed Bridgeforth was tenuous. Excluding the inadmissible hearsay and other evidence discussed below, the only evidence possibly linking defendant to the murder comes from Ramon McLeod, who was with Bridgeforth on the night he was killed. But on that night, after Bridgeforth was shot and the vehicle he was driving crashed into a pole, McLeod told the first witness at the scene, a woman who lived nearby, that no one had been shot. McLeod also told the first police officer on the scene that he and Bridgeforth had been out celebrating his birthday at the bar and that he (McLeod) had fallen asleep in the vehicle and remained asleep until he awoke to find himself trapped by the dashboard of the vehicle.

More importantly, however, at trial, McLeod admitted that before Bridgeforth was shot, McLeod did not

see defendant actually shoot at their vehicle. He *heard* shots being fired as defendant's vehicle was passing theirs, going in the opposite direction, and defendant was driving the vehicle. But McLeod had also testified that two or more people were in defendant's vehicle when it left the bar, shortly before this shooting. And, although McLeod had *heard* shots being fired in the bar parking lot before Bridgeforth was fatally shot, McLeod had not seen defendant shooting a gun there. Further, a gun of the type involved in this shooting was never recovered. And, finally, before reaching their ultimate verdict about three days after the close of proofs, the jurors had twice declared that they could not reach a verdict.

In summary, after review of the entire case, it appears more probable than not that the erroneous admission of the hearsay evidence affected the outcome of the trial. However, even if we were equivocal about this conclusion, we would reverse and remand for a new trial because of the cumulative effect of other evidentiary errors discussed below. See *People v Unger*, 278 Mich App 210, 261; 749 NW2d 272 (2008).

B. NOT HEARSAY—MRE 801(d)(1)

Next, defendant argues that the trial court erred by admitting third-party testimony concerning a statement of identification that did not meet the standard set forth in MRE 801(d)(1)(C). We agree.

At trial, over a hearsay objection by the defense, the prosecution was allowed to question Sabrina Bridgeforth about what Ramon McLeod said to her at the hospital after she found out that her brother had been killed. In response to the objection, the prosecution claimed that the anticipated testimony was offered as a statement of identification permitted under MRE 801(d)(1)(C). The prosecution claimed that Ramon

McLeod was going to testify that he "saw the shooter" and that Sabrina Bridgeforth was "merely repeating his statement of identification at the proceedings." After noting that the identifier normally testifies first, the trial court nevertheless permitted the testimony, which was elicited through the following questions:

> *Q.* Tell us exactly what Ramon said to you the first time you see him about your brother's death?
>
> *A.* I asked Ramon what happened and was he with my brother and he told me that Stone killed him and he was in a black escalade [sic].
>
> * * *
>
> *Q.* So the first thing out of his mouth is Stone did it?
>
> *A.* Yes.

The phrase "Stone did it," was repeated at least seven times during the prosecution's direct examination of this witness. Although this issue was raised in defendant's motion for a new trial, the court did not address this claim.

MRE 801(d)(1)(C) provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person . . . ." As defendant argues, however, one of the problems with the admission of Sabrina Bridgeforth's testimony is that Ramon McLeod, who testified *after* Sabrina Bridgeforth, clearly testified that he, in fact, did *not* see defendant shoot Bridgeforth. Thus, the prosecution's assertion to the trial court that McLeod would testify that he "saw the shooter" and that this witness was "merely repeating his statement of identification at the proceedings" was not true. If Ramon

McLeod had testified before Sabrina Bridgeforth, this damaging and repeated hearsay testimony would not have been admitted into evidence. Therefore, even if we were to conclude that this type of a statement could be a statement of "identification" within the contemplation of MRE 801(d)(1)(C), the statement in this case was not such a statement. We conclude that this repeated "Stone did it" testimony was damaging inadmissible hearsay that, combined with the other errors in this trial, merits reversal and retrial.

C. BAD ACTS EVIDENCE—MRE 404(b)

Next, defendant argues that the trial court erroneously permitted the admission of prior bad acts evidence relating to defendant's past possession of firearms. We agree.

On cross-examination, defense counsel questioned Officer Kurtis Staples concerning the type of gun used in the homicide, and Staples replied "a .223," which is a type of assault rifle. Then Officer Staples was asked whether he had any credible proof that defendant ever owned or possessed a .223 assault rifle, and Staples replied in the negative. On re-direct examination by the prosecution, the following exchange occurred:

> *Q.* Officer Staples, [defense counsel] asked you as to whether you had any direct knowledge regarding the defendant having a .223 weapon or any kind of weapon period, do you remember that?
>
> *Defense Counsel:* Objection, your Honor, what I said was a .223 weapon. I did not say any kind of weapon. I specifically focused on the .223.
>
> *The Court:* All right.
>
> *Q.* Officer Staples, when the defendant was arrested in November of '98 for carrying a concealed weapon, do you know if that was a .233 [sic]?

A. No, I don't.

Q. And when he was arrested and pled guilty of [sic] April of 1999 for carrying a concealed weapon, do you know if that was a .223?

A. No.

Q. And when he was arrested and convicted in Oakland County in September of 2001 for carrying a concealed weapon, do you know if that was a .233 [sic]?

A. No.

Q. And, sir, when he was arrested by Redford Township after a search warrant was executed at the address on Codding, do you know if there was a .223 located in that house amongst the 7 or 8 weapons recovered?

Defense Counsel: Objection as to facts not in evidence.

Q. Do you know if a .223 was involved, sir?

A. I don't know.

Later, defendant moved for a mistrial based on the admission of this evidence, to which the prosecution responded that there was no miscarriage of justice. Defendant subsequently withdrew his motion for mistrial. However, defendant raised this issue in his motion for a new trial, but the trial court held that even if it erred by allowing the admission of this evidence, it did not affect the outcome of the trial.

On appeal, the prosecution concedes that the prosecutor's questions about other weapons and weapons-related convictions resulted in the admission of irrelevant evidence. Nevertheless, the prosecution contends that the error was harmless. We disagree. This error, much like the error involving the alleged "statement of identification," was deliberately injected into the proceedings by the prosecution and, in light of the other erroneously admitted "state of the mind" evidence, was particularly inflammatory and prejudicial. See *People v*

Minor, 213 Mich App 682, 686; 541 NW2d 576 (1995). The facts were that there was no evidence presented during this trial that defendant had a gun on the night of the shooting—neither at the bar before the shooting, nor during the shooting. We conclude that the erroneous and deliberate introduction of this highly prejudicial testimony, combined with the other errors in this trial, merits reversal and retrial.

D. EVIDENCE OF FLIGHT

Next, defendant argues that the trial court erroneously admitted evidence that defendant was arrested by a Drug Enforcement Administration (DEA) agent in Georgia two weeks after the homicide as "evidence of flight." We agree.

On the first day of trial, the prosecutor advised defense counsel that she was going to introduce evidence that defendant was arrested in Georgia by a DEA agent two weeks after the homicide in this case. Defense counsel objected to the admission of this evidence before the proceedings began on the grounds that (1) he had received unfair and untimely notice of the evidence, (2) the evidence was irrelevant, and (3) the evidence was more prejudicial than probative. The prosecutor responded that the evidence was being offered as evidence of flight. Defense counsel rebutted the claim, arguing that the evidence was not relevant. At that time, defendant did not know he was wanted for a crime and, in fact, he was not wanted for a crime because there was no warrant for his arrest. Thus, defendant had every right to go wherever he wanted. The trial court took the matter under advisement, but eventually the DEA agent did testify that defendant was arrested in Georgia about two weeks after the homicide. A flight instruction was also given to the jury.

Evidence of flight is generally admissible when it is probative of a defendant's consciousness of guilt. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). That is, defendant's flight from the scene of the crime, the jurisdiction, and the police can constitute circumstantial evidence of consciousness of guilt and, accordingly, the fact of guilt itself. See *id*.; McCormick, Evidence (4th ed), § 263, p 462. However, mere departure from the crime scene or, in this case, the jurisdiction, does not give rise to such an inference. See *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

In its brief on appeal, the prosecution merely asserts, without supporting argument, that the evidence was properly admitted. It was not. There is no evidence in the record that defendant left the jurisdiction because he was aware of, or motivated by fear of apprehension for, the homicide in this case. See *Hall*. The prosecution did not rebut defense counsel's claim that, before or during the time defendant was in Georgia, defendant had no knowledge about the matter. Thus, although the prosecutor is permitted to argue the evidence and all reasonable inferences arising from the evidence, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), considering the record evidence here, the prosecutor could not reasonably imply that in leaving the jurisdiction defendant was in "flight" in the legal sense. Further, even if this evidence had minimal probative value as circumstantial evidence of defendant's guilt, that value was substantially outweighed by the danger of unfair prejudice. See MRE 403. Accordingly, the trial court abused its discretion by admitting this evidence. This error, combined with the other errors in this trial, merits reversal and retrial.

In summary, defendant is entitled to a new trial. Several significant evidentiary errors occurred during

the trial of this matter that, after review of the entire case, lead us to conclude that the errors, either individually or in combination resulted in a miscarriage of justice. See MCL 769.26. The admission of extensive inadmissible and irrelevant, but highly damaging evidence, that appears in part to have been deliberately injected into this proceeding, likely prejudiced defendant in light of the fairly weak evidence against him.

II. DEFENSE ATTORNEY ISSUES

On appeal, defendant also raises two issues regarding his attorney. First, defendant claims that he was denied his right to a conflict-free attorney. Second, defendant raises several claims in support of his argument that he was denied the effective assistance of counsel. In light of our conclusion that a new trial is warranted in this matter, we will only address the first claim. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

A. CONFLICT-FREE DEFENSE ATTORNEY

Defendant argues that he was denied his constitutional right to a conflict-free attorney because his attorney, Kevin Hammons, failed to call an exculpatory witness, Kevin Barlow, after the prosecutor threatened to rebut that witness's testimony with evidence that Hammons had asked defendant's family members for money to pay off that witness. We disagree.

To establish a conflict of interest claim, a defendant must demonstrate that an actual conflict of interest existed and that it negatively affected his attorney's performance. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). Here, defendant claims: "The conflict of interest arose because the attorney, Kevin Hammons, tried to extort more money from the family by claiming that he

needed to pay off Barlow." But, as the trial court held, the only evidence supporting defendant's assertion was provided by defendant's brother, Charles Smelley.

The record evidence revealed that Charles did not want defendant represented by Hammons and the Smelley family had hired another attorney as co-counsel with Hammons. During a tape-recorded conversation defendant had with Charles on a jail telephone, Charles told defendant that Hammons had told him to pay the witness money to come to court. At the *Ginther*[1] hearing, Charles testified that he had been told by Hammons to give him money to pay Barlow to go to court. Hammons also testified at the *Ginther* hearing, and vehemently denied the allegation. Hammons further indicated that, after a pretrial motion did not go well, Charles had threatened him with bodily harm. Barlow testified at the *Ginther* hearing that he was neither offered nor paid any money for his testimony. The trial court held that the *Ginther* hearing testimony of Hammons was more credible than Charles's testimony. In light of the trial court's superior ability to judge the credibility of the witnesses who appeared before it, as well as the record evidence, we defer to the trial court's conclusion that Hammons's testimony was more believable than the testimony of defendant's brother. See *People v Canter*, 197 Mich App 550, 561; 496 NW2d 336 (1992). Accordingly, the trial court's denial of defendant's motion for a new trial premised on this conflict of interest claim is affirmed.

III. PROSECUTORIAL MISCONDUCT

Defendant raises three claims of prosecutorial misconduct on appeal. First, defendant claims that the

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

prosecution failed to disclose that defense counsel was not conflict-free. For the reasons discussed above, this claim is without merit. Second, defendant argues that the prosecution committed misconduct by admitting the MRE 404(b) evidence pertaining to defendant's past possession of firearms. This error was addressed above. Third, defendant argues that the prosecution purposefully withheld discovery materials until the day of trial in violation of a court order and in order to have an unfair advantage. Although the record appears to support this claim, in light of our conclusion that a new trial is warranted in this matter, we need not address this moot claim. See *Rutherford*.

Reversed and remanded for a new trial. We do not retain jurisdiction.

LIGONS v CRITTENTON HOSPITAL

Docket No. 278622. Submitted July 14, 2009, at Detroit. Decided August 18, 2009, at 9:00 a.m.

Dujuan Ligons, as personal representative of the estate of Edris Ligons, deceased, brought a wrongful death, medical malpractice action in the Oakland Circuit Court against Crittenton Hospital, David B. Bauer, M.D., and Rochester Emergency Group, P.C. (REG). The decedent had gone to the Crittenton Hospital emergency room, complaining of vomiting, diarrhea, chills, and a fever after a recent colonoscopy. She was treated in the emergency room by Dr. Bauer, whose practice group was REG. Dr. Bauer determined that the decedent was suffering from gastroenteritis and dehydration, gave her antibiotics and fluids, then discharged her from the hospital. The decedent returned to the emergency room on the following day, was diagnosed with peritonitis resulting from a perforated colon, suffered sepsis and multiple organ failure, and died several days later. In the action, the defendants moved for summary disposition, claiming that the plaintiff's notice of intent to sue (NOI), supplemental NOI, and affidavits of merit failed to comply with statutory requirements, that because the three-year period available under the wrongful death saving statute had expired, a conforming NOI or affidavit of merit could not be filed, and that the proper remedy was a dismissal with prejudice. The court, Gene Schnelz, J., denied the motions. The Court of Appeals denied Dr. Bauer and REG leave to file an interlocutory appeal. Unpublished order of the Court of Appeals, entered January 16, 2008 (Docket No. 278622). The Supreme Court, in lieu of granting leave, remanded the case to the Court of Appeals for consideration as on leave granted. 482 Mich 1005 (2008). The Court of Appeals granted Crittenton Hospital's application for leave to file a delayed cross-appeal. Unpublished order of the Court of Appeals, entered March 2, 2009 (Docket No. 288793).

The Court of Appeals *held*:

1. The plaintiff's NOI and supplemental NOI satisfied the requirements of MCL 600.2912b. The NOI stated the factual basis for the claim, as required by MCL 600.2912b(4)(a), and stated the applicable standard of practice or care, as required by MCL

600.2912b(4)(b). The supplemental NOI stated the manner in which it is alleged that the breach of the standard of practice or care was the proximate cause of the decedent's injury, as required by MCL 600.2912b(4)(e).

2. The affidavits of merit submitted by the plaintiff failed to comply with the requirement in MCL 600.2912d(1)(d) that an affidavit contain a statement of the manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the NOI. The affidavits contain no explanation regarding how Dr. Bauer's decision not to admit the decedent to the hospital on her first visit to the emergency room or obtain appropriate consultations was the proximate cause of the decedent's death. The failure to explain how Dr. Bauer's breach of the applicable standard of care caused the decedent's death necessarily constitutes a failure to establish REG's and Crittenton Hospital's vicarious liability.

3. The plaintiff's action must be dismissed with prejudice because the wrongful death saving period was not tolled upon the filing of the complaint and the affidavits of merit and that period has since expired. Although the statutory period of limitations is tolled when an affidavit of merit is successfully challenged as invalid, allowing a plaintiff to file a complaint accompanied by a conforming affidavit of merit within the remaining time available under the period of limitations, there is no similar tolling of the wrongful death saving period because the wrongful death saving provision is not a statute of limitations. If, as in this case, an affidavit of merit is successfully challenged as being invalid and there is no remaining time available under the wrongful death saving period, dismissal with prejudice is required. MCR 2.110(A) does not include an affidavit of merit among the items defined as a pleading. Accordingly, an affidavit of merit is not a pleading that can be amended and that can relate back to the date of the original pleading under MCR 2.118(A), (D).

Reversed and remanded for the entry of an order of dismissal with prejudice.

FITZGERALD, J., concurring in part and dissenting in part, disagreed that the affidavits failed to comply with the requirements of MCL 600.2912d. One affidavit stated the applicable standard care as being the reasonable care, diligence, skill, and judgment possessed by similarly staffed and equipped hospitals under the same or similar circumstances or by physicians or health care providers under the same or similar circumstances. One affidavit indicated the actions that should have been taken in order to comply with the standard of care by stating that the

decedent should have been admitted to the hospital on her first visit to the emergency room and that consultations with other physicians should have been obtained. Both affidavits indicated how the breach of the standard of care proximately caused the decedent's injury by stating that Dr. Bauer's acts or omissions proximately caused the decedent's death. Judge FITZGERALD would affirm the trial court's denial of the defendants' motions for summary disposition.

1. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICES OF INTENT TO FILE SUIT.

A notice of intent to file a medical malpractice action need not be in any format but must identify, in a readily ascertainable manner, the specific information mandated by statute (MCL 600.2912b).

2. NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT.

An affidavit of merit in support of a medical malpractice action requires no less specificity than a notice of intent to file a medical malpractice action (MCL 600.2912d).

3. LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — WRONGFUL DEATH SAVING PROVISION — AFFIDAVITS OF MERIT.

The wrongful death saving period is not tolled when an affidavit of merit is successfully challenged as being invalid; if an affidavit of merit is successfully challenged and there is no remaining time under the wrongful death saving period, the medical malpractice action must be dismissed with prejudice (MCL 600.2912d, 600.5852).

Turner & Turner, P.C. (by *Matthew L. Turner* and *Argyrios E. Tsakalakis*), for Dujuan Ligons.

Mellon, McCarthy & Pries, P.C. (by *James T. Mellon*), for Crittenton Hospital.

Tanoury, Corbet, Shaw, Nauts, Essad & Beutel, P.L.L.C. (by *William A. Tanoury* and *Anita Comorski*), for David Bauer, M.D., and Rochester Emergency Group, P.C.

Before: TALBOT, P.J., and FITZGERALD and HOEKSTRA, JJ.

HOEKSTRA, J. Plaintiff, Dujuan Ligons, as the personal representative of the estate of Edris Ligons, deceased, brought this wrongful death, medical malpractice action against Crittenton Hospital, David Bruce Bauer, M.D. (Dr. Bauer), and Dr. Bauer's practice, Rochester Emergency Group, P.C. (REG). Defendants Dr. Bauer and REG and defendant Crittenton Hospital filed separate motions for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff failed to file a sufficient notice of intent pursuant to MCL 600.2912b, or a sufficient affidavit of merit pursuant to MCL 600.2912d, within the applicable limitations period. The trial court denied the motions. Defendants Dr. Bauer and REG thereafter filed an application for leave to file an interlocutory appeal, which this Court denied. *Ligons v Crittenton Hosp*, unpublished order of the Court of Appeals, entered January 16, 2008 (Docket No. 278622). However, our Supreme Court, in lieu of granting Dr. Bauer and REG's application for leave to appeal, remanded the case to this Court for consideration as on leave granted. *Ligons v Crittenton Hosp*, 482 Mich 1005 (2008). This Court thereafter granted Crittenton Hospital's application for leave to file a delayed cross-appeal and ordered that all further filings be made in this case. *Ligons v Crittenton Hosp*, unpublished order of the Court of Appeals, entered March 2, 2009 (Docket No. 288793).

We conclude that plaintiff's supplemental notice of intent complied with MCL 600.2912b, but that his affidavits of merit failed to comply with MCL 600.2912d. Because the filing of plaintiff's complaint and the accompanying affidavits of merit did not toll the wrongful death saving period and the wrongful death saving period has since expired, the proper remedy for plaintiff's failure to submit a conforming affidavit of merit is dismissal with prejudice. We therefore reverse

and remand for entry of an order of dismissal with prejudice.

I. BASIC FACTS AND PROCEDURAL HISTORY

This malpractice action arises from Dr. Bauer's treatment of the decedent on January 22, 2002, at the Crittenton Hospital emergency room. According to plaintiff, the 54-year-old decedent, who had recently had a colonoscopy, began experiencing vomiting, diarrhea, chills, and fever. She went to the emergency room at Crittenton Hospital on January 22, 2002, and was treated by Dr. Bauer. She allegedly was treated for gastroenteritis and dehydration, was given antibiotics and fluids, and then discharged later that day. She continued to experience severe pain and went back to the emergency room the next day, where she was diagnosed with peritonitis because of a perforated colon. She developed sepsis and surgical resection was not possible. Despite receiving extensive medication, the sepsis led to multiple organ failure, resulting in the decedent's death on January 29, 2002.

Plaintiff was appointed personal representative of the decedent's estate on February 22, 2005. On June 8, 2005, plaintiff served a notice of intent (NOI) to file a medical malpractice action on Dr. Bauer, REG, and Crittenton Hospital pursuant to MCL 600.2912b. A supplemental NOI was later served on October 21, 2005. Although the two-year period of limitations for a medical malpractice action, MCL 600.5805(6), had expired, plaintiff, as the personal representative of the decedent's estate, had additional time in which to file a lawsuit under the wrongful death saving statute, MCL 600.5852. The statute provides that when a person dies before the period of limitations has run or within 30

days after the period of limitations has run, the personal representative may bring an action at any time within two years after letters of authority are issued, but no later than three years after the period of limitations has run. Plaintiff filed this action against defendants on April 7, 2006.

In March 2007, defendants Dr. Bauer and REG filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff failed to properly commence this action because both the NOI that was served before the complaint was filed and the affidavits of merit that were filed along with the complaint failed to comply with statutory requirements. These defendants argued that dismissal with prejudice was required because the three-year "ceiling" available under the wrongful death saving statute had expired on January 22, 2007, leaving no time to file a conforming NOI or affidavit of merit. Defendant Crittenton Hospital later filed a separate motion raising the same arguments. The trial court denied defendants' motions, finding that the NOI and the affidavits of merit complied with statutory requirements.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(7). *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If there are no factual disputes and reasonable minds cannot differ regarding the legal effect of the facts, the decision whether a plaintiff's claim is barred is a question of law. *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002). Our analysis of this case turns on the requirements of MCL 600.2912b and 600.2912d. The proper application of a statute is a

question of law that is reviewed de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. NOTICE OF INTENT

MCL 600.2912b(1) provides, in part, that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." Regarding the requirements of the prescribed notice, MCL 600.2912(b)(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

The NOI need not be in any particular format, but it "must identify, in a readily ascertainable manner, the specific information mandated by [MCL 600.2912b(4)]."

Roberts v Mecosta Co Gen Hosp (After Remand), 470 Mich 679, 696; 684 NW2d 711 (2004). "[N]o portion of the notice of intent may be read in isolation; rather, the notice of intent must be read as a whole." *Miller v Malik*, 280 Mich App 687, 696; 760 NW2d 818 (2008). The plaintiff bears the burden of establishing compliance with MCL 600.2912b. *Roberts*, *supra* at 691.

Dr. Bauer and REG contend that plaintiff's NOI failed to articulate a factual basis for his claim, failed to articulate the applicable standard of care, and failed to articulate the manner in which the alleged breach of the standard of care was the proximate cause of the decedent's death.[1] Similarly, Crittenton Hospital argues that the NOI failed to set forth the manner in which that defendant allegedly breached the applicable standard of care, failed to articulate any alleged action that should have been taken to achieve compliance with the standard of care, and failed to set forth the manner in which the alleged breach of the standard of care caused the decedent's death.

We conclude that the factual basis statement in the NOI is sufficient. Under the heading "Factual Basis for Claim," plaintiff related the symptoms that the decedent presented in her emergency room visit on January 22, 2002. He stated that the radiologist recommended "progress views" after the decedent's abdominal x-ray showed abnormalities indicative of a bowel obstruction. Under the heading "Manner the Applicable Standard of Practice or Care was Breached," plaintiff listed 20 general allegations, followed by three specific allegations:

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[1] Although Dr. Bauer and REG challenged the breach of the standard of care and the proximate cause elements of the NOI below, they did not challenge the sufficiency of the factual basis. Accordingly, because the challenge relating to the factual basis was not preserved below, it is reviewed for plain error affecting substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

> u. Failed to admit patient to the hospital on January 22, 2002;
>
> v. Failed to obtain appropriate [consultations] on January 22, 2002 such as surgery and/or GI;
>
> w. Failed to obtain progress x-rays of the abdomen and a CT scan on January 22, 2002 prior to discharging the patient[.]

Plaintiff alleged that Crittenton Hospital was vicariously liable for its employees' and agents' actions, and that it was also liable for the negligent supervision and hiring of employees and agents and for the negligent granting of staff privileges. He further alleged that REG was vicariously liable for Dr. Bauer's actions. He identified 19 paragraphs as describing the breaches for which Dr. Bauer was specifically responsible, and attributed the remaining paragraphs to Crittenton Hospital. The 19 paragraphs attributed to Dr. Bauer included paragraphs u through w, which alleged the specific breaches of the standard of care. Consequently, the factual basis was sufficient.

With respect to Dr. Bauer and REG's argument that the NOI failed to allege the actions that should have been taken or avoided in order to comply with the applicable standard of care, we agree that plaintiff's NOI, under the heading "Applicable Standard of Care or Practice Alleged," is the sort of tautology that was deemed insufficient in *Roberts*, *supra* at 693-694. When read as a whole, however, the NOI articulates that Dr. Bauer, the emergency room physician, breached the standard of care by failing to admit the decedent to the hospital, failing to obtain appropriate consultations, and failing to obtain certain diagnostic tests. The NOI also articulates that REG is vicariously liable for Dr. Bauer's breaches of the standard of care. A reader of the document is not left to guess at the functions that Dr. Bauer and REG should have performed to meet the standard of care.

We agree, however, that plaintiff's original NOI fails to articulate the *manner* in which defendants' alleged breach of the standard of care injured the decedent. There is no explanation of how Dr. Bauer's decision to discharge the decedent from the emergency room on January 22, 2002, without obtaining progress x-rays or other appropriate consultations, caused or contributed to her death one week later. Plaintiff does not allege any deficiency in the treatment the decedent received the following day, and there is no explanation for how the one-day delay diminished the decedent's opportunity for successful treatment and recovery. A reader of the NOI must guess that plaintiff's malpractice action might possibly be based on a theory that proper diagnostic testing on January 22 would have enabled Dr. Bauer to discover the decedent's illness and begin treatment then, before her condition became hopeless the next day. But to the extent that the original NOI was insufficient in this regard, we agree with plaintiff that his supplemental NOI, served on October 21, 2005, corrected this deficiency. The supplemental NOI added the following statement:

> [H]ad Dr. Bauer admitted the patient to the hospital on January 22, 2002 and had appropriate consult[ations] been obtained including surgery and GI and had progress X-rays been obtained the patient[']s peritonitis would have been diagnosed much earlier. The [perforated] colon would have been detected and surgery would have been performed much earlier. This would have avoided the overwhelming sepsis that led to multi organ system failure and ultimately death.

This statement articulates a causal connection between Dr. Bauer's alleged breaches and the decedent's death. If Dr. Bauer had ordered the proper diagnostic tests, timely diagnosis of the peritonitis and timely detection of the perforated colon would have led to treatment in

avoidance of the sepsis that caused the decedent's organ failure and death. Thus, we conclude that the supplemental NOI remedied the deficiency in the original NOI.[2]

With respect to Crittenton Hospital, the supplemental NOI is deficient in certain respects, but nonetheless adequate. Paragraphs y through aa in both the original NOI and the supplemental NOI raise allegations of negligent supervision, negligent hiring, and negligent granting of staff privileges, but neither NOI includes any description of how Crittenton Hospital was negligent with respect to Dr. Bauer and REG's actions on January 22, 2002, or the manner in which that negligence caused the decedent's injury. Paragraph dd confusingly states that Crittenton Hospital is responsible "for all paragraphs not identified in bb," but no paragraphs are identified in paragraph bb. Assuming that plaintiff intended to reference paragraph cc, the incorporated paragraphs are as follows:

> b. Failed to ascertain and assure that trained and competent hospital personnel were, and would be, caring for and administering to the patient, and allowed untrained, and/or unqualified personnel to care for and treat the patient;
>
> * * *
>
> o. Failed to employ sufficient and competent physicians, nurses and other employees with which to provide reasonably prudent and proper medical care and service to the patient;

---

[2] Because we conclude that REG is not entitled to summary disposition on the basis of an insufficient NOI, we need not address plaintiff's argument that, pursuant to MCL 600.2912b, he was not required to provide an NOI to REG because REG, as a professional corporation, is not a "health professional" or "health facility."

> p. Failed to establish and enforce or reasonably comply with Federal, State, industry, and professional standards . . . reasonably designed for the care of its' [sic] patients, and/or failed to comply with, or require compliance with its' [sic] own standards, bylaws, rules and regulations for the care of patients in the patient's condition;
>
> * * *
>
> s. Failed to ascertain the skill or qualifications of doctors who treated the patient and failed to provide, or adequately carry out through medical staff, reasonable procedures for the review, and/or supervision, of medical care furnished by doctors, to the patient[.]

Again, however, plaintiff failed to draw a causal connection between any of these alleged breaches of the applicable standard of care for a hospital and the decedent's death. Plaintiff alleged nothing regarding any staff member or physician other than Dr. Bauer's failure to order certain tests and failure to admit the decedent to the hospital. Plaintiff failed to explain how Crittenton Hospital was negligent in engaging Dr. Bauer in its emergency room as an employee, agent, or physician with staff privileges, or how this alleged negligence contributed to the decedent's death.

Despite these inadequacies, the supplemental NOI is sufficient by virtue of paragraph x, which alleges that Crittenton Hospital is responsible for its employees and actual or ostensible agents. Although the paragraph fails to explain the relationship between Dr. Bauer and Crittenton Hospital, it sufficiently permits an inference that Crittenton Hospital has an employment/agency relationship with Dr. Bauer that renders it vicariously responsible for Dr. Bauer's alleged negligence. As discussed previously, the supplemental NOI is sufficient to explain the manner in which Dr. Bauer's alleged breach

of the applicable standard of care was the proximate cause of the decedent's injury. Accordingly, Crittenton Hospital, like Dr. Bauer and REG, was not entitled to summary disposition on the basis of an inadequate NOI.

IV. AFFIDAVITS OF MERIT

Defendants also argue that plaintiff failed to file with his complaint affidavits of merit that conformed to the requirements of MCL 600.2912d, which provides that a plaintiff claiming medical malpractice must file with the complaint an affidavit of merit signed by a qualified health professional. The affidavit must certify that the health professional has reviewed the notice and all medical records supplied by the plaintiff's attorney, and must also contain a statement of each of the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

These requirements mirror four of the requirements specified for NOIs under MCL 600.2912b. An affidavit of merit requires no less specificity than a notice of intent. See *Mullaney v Kistler*, 471 Mich 932 (2004) (remanding for this Court to consider an affidavit of merit in light of *Roberts*); see also *King v Reed*, 278 Mich App 504, 516-517; 751 NW2d 525 (2008) (the Supreme Court's statement in *Roberts*, *supra* at 691-

692, that a plaintiff must make a good-faith effort to aver the specific standard of care that is claimed to be applicable to each professional or facility applies equally to an affidavit of merit).

The affidavit of merit submitted by Dr. George Sternbach recites the alleged breaches of the standard of care, namely the failure to hospitalize the decedent on January 22, 2002, and to obtain appropriate consultations, and recites that "[a]s a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, [sic] died." The affidavit submitted by Dr. Fred Thomas states that if Dr. Bauer had admitted the decedent on January 22, 2002, and obtained the appropriate consultations, "Edris Ligons would not have died." To satisfy the requirement that an affidavit of merit state "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged," it is insufficient to merely allege that the defendant's alleged negligence caused the injury. *Roberts*, *supra* at 699 n 16. Like plaintiff's original NOI, the affidavits of merit contain no explanation regarding how Dr. Bauer's decision not to admit the decedent on January 22, 2002, or obtain appropriate consultations was the proximate cause of the decedent's death. The affidavits of merit, even when read as a whole, *Esselman v Garden City Hosp*, 284 Mich App 209; 772 NW2d 438 (2009), establish no connection between the purpose of the consultations, or what condition they might have revealed, and the cause of the decedent's death, nor do they explain how the one-day delay in admitting the decedent made the outcome death instead of recovery.

These deficiencies apply to all three defendants. The failure to explain how Dr. Bauer's breach of the applicable standard of care caused the decedent's death

necessarily constitutes a failure to establish REG's and Crittenton Hospital's vicarious liability. We therefore conclude that the affidavits of merit were insufficient to comply with the statutory requirements.

V. REMEDY

Defendants argue that the limitations period for filing a malpractice action has expired and, therefore, plaintiff's failure to file a complaint with a conforming affidavit of merit requires dismissal with prejudice. Plaintiff responds that dismissal with prejudice is not the proper remedy. According to plaintiff, because an affidavit of merit is a pleading, an affidavit of merit is subject to amendment and the amended affidavit relates back to the date of the filing of the complaint. Plaintiff requests that we remand the case to give him an opportunity to file a motion to amend the affidavits of merit.

A medical malpractice claim generally "accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . ." MCL 600.5838a(1). As previously indicated, the two-year statutory limitations period applicable to medical malpractice actions, MCL 600.5805(6), expired before this action was filed. Consequently, plaintiff relies on the additional time afforded under the wrongful death saving statute, MCL 600.5852, which provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

MCL 600.5856 provides for tolling of statutes of limitations or repose. This statute provides, in pertinent part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

In *Waltz v Wyse*, 469 Mich 642, 650-651; 677 NW2d 813 (2004), our Supreme Court held that MCL 600.5856(c) (formerly MCL 600.5856[d]) is not applicable to toll the period prescribed under the wrongful death saving statute. The Court explained that "[MCL 600.5856(d)], by its express terms, tolls only the applicable statute of limitations or repose. . . . [T]he wrongful death provision, [MCL 600.5852], is a *saving statute*, not a statute of limitations." *Id.* at 650 (citation and quotation marks omitted; emphasis in original). The Court further explained:

> By its own terms, [MCL 600.5852] is operational only within the context of the *separate* "period of limitations" that would otherwise bar an action. [MCL 600.5852] clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired. [*Id.* at 651 (emphasis in original).]

The Court concluded that the three-year ceiling provided by the wrongful death saving statute is not "tolled" when a plaintiff files a notice of intent after the expiration of the statute of limitations. *Id.* at 651-652.

In this case, the following dates are relevant:

January 22, 2002	Date of the alleged malpractice
April 26, 2002	Letters of authority issued to the decedent's husband, Herbert Ligons
January 22, 2004	Expiration of the two-year statutory limitations period
February 22, 2005	Letters of authority issued to plaintiff
June 8, 2005	NOI served on defendants
October 21, 2005	Supplemental NOI served on defendants
April 7, 2006	Complaint and affidavits of merit filed[3]
January 22, 2007	Expiration of the three-year "ceiling" under the wrongful death saving statute

In *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007), our Supreme Court held that the filing of a complaint and an affidavit of merit tolls the statutory limitations period until the affidavit is successfully challenged as invalid. In other words, if a plaintiff files a complaint and an affidavit of merit before the statutory limitations period expires and the affidavit is subsequently determined to be invalid, the proper remedy is dismissal without prejudice, thereby enabling the plaintiff to file a complaint accompanied by a conforming affidavit of merit within the remaining time available under the statutory limitations period. In concluding that the limitations period is tolled until the

[3] Plaintiff avers, and defendants do not dispute, that plaintiff was entitled to file his complaint 154 days after furnishing the NOI because defendants did not respond to either the original or the supplemental NOI. See MCL 600.2912b(8).

affidavit of merit is successfully challenged, the Court relied on MCL 600.5856(a), which provides that statutes of limitations or repose are tolled when a complaint is filed. *Kirkaldy*, *supra* at 585.

However, our Supreme Court's decision in *Waltz* compels the conclusion that there is no similar tolling of the wrongful death saving period, because the wrongful death provision, MCL 600.5852, is a *saving statute*, not a statute of limitations. Although *Waltz* involved the application of former MCL 600.5856(d), rather than MCL 600.5856(a), this distinction is immaterial because the "statutes of limitations or repose" limitation applies generally to the entire statute. Thus, the filing of a complaint and an affidavit of merit does not toll the running of the wrongful death saving period. Accordingly, if an affidavit of merit is subsequently successfully challenged as invalid and there is no remaining time available under the wrongful death saving period, dismissal with prejudice is required.[4]

Plaintiff argues that because an affidavit of merit is a pleading, it can be amended pursuant to MCR 2.118(A). Because an amended pleading relates back to the date of the originally filed pleading, MCR 2.118(D), plaintiff claims that an amended affidavit of merit would fall within the wrongful death saving period. Caselaw does not directly negate plaintiff's argument that an affidavit of merit is a pleading. In *Barnett v Hidalgo*, 478 Mich 151, 160-161; 732 NW2d 472 (2007), our Supreme Court described an affidavit of merit as "part of the pleadings" in regard to its holding that the statements

[4] Contrary to plaintiff's assertion, the wrongful death saving statute does not require that a wrongful death action must be completed before the three-year "ceiling" expires. The saving statute only requires that an action be "*commence*[*d*] . . . within 3 years after the period of limitations has run." MCL 600.5852 (emphasis added).

contained therein are admissible as party-opponent admissions under MRE 801(d)(2)(B) and (C). In *Kowalski v Fiutowski*, 247 Mich App 156, 164; 635 NW2d 502 (2001), this Court stated that "when a defendant fails to file an affidavit of meritorious defense, that defendant has failed to plead." However, neither of these cases directly held that an affidavit of merit is, in itself, a pleading. The term "pleading" is restrictively defined in MCR 2.110(A) as including only (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counter-claim, or third-party complaint, and (6) a reply to an answer. The court rule does not define the term "pleading" to include mandatory attachments such as an affidavit of merit. In the absence of any positive authority suggesting that an affidavit of merit may be amended pursuant to MCR 2.118(A), we conclude that the only permissible remedy for a defective affidavit of merit is the one prescribed in *Kirkaldy*, which is dismissal. See also *Jackson v Detroit Med Ctr*, 278 Mich App 532, 543; 753 NW2d 635 (2008) (indicating that the proper remedy for a defective affidavit of merit is not amendment but dismissal).

VI. CONCLUSION

In sum, although we conclude that plaintiff's supplemental NOI was sufficient to comply with statutory requirements, we conclude that the affidavits of merit were not, and that dismissal is required. Because the wrongful death saving period was not tolled and because that period has since expired, the dismissal must be with prejudice. Accordingly, we reverse the trial court's decision denying defendants' motions for summary disposition and remand for entry of an order of dismissal with prejudice.

Reversed and remanded for entry of an order of dismissal with prejudice. We do not retain jurisdiction.

TALBOT, P.J., concurred.

FITZGERALD, J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's conclusion that the affidavits of merit were insufficient to comply with the requirements of MCL 600.2912d. I would affirm the order denying defendants' motions for summary disposition.

Plaintiff's decedent, Edris Ligons, went to the Crittenton Hospital emergency room on January 22, 2002, complaining of abdominal pain. Defendant Dr. David Bruce Bauer, M.D., treated plaintiff, but she was discharged from the hospital. The following day, Ligons was seen by her treating physician, Dr. Ghiath Tayeb, who then sent Ligons to the hospital. Ligons was admitted, but she eventually died on January 30, 2002. Plaintiff alleges that Dr. Bauer and defendant Rochester Emergency Group, P.C., were professionally negligent because they failed to properly diagnose and treat Ligons for a suspected perforated colon.

On or about June 8, 2005, plaintiff sent a notice of intent (NOI) to Dr. Bauer, the P.C., and Crittenton Hospital, which set forth the following factual basis for the medical malpractice claim:

> Edris Ligons was a 54-year-old woman, with a history of colon polyps, with one atypical polyp found on a previous colonoscopy. She came to Crittenton Hospital for an outpatient follow-up colonoscopy on January 14, 2002. Dr. Tayeb noted during the procedure that the colon was very tortuous and pressure had to be applied to reach the cecum. The clinical diagnosis was diverticulosis and hemorrhoids.
>
> On January 22, 2002 Mrs. Ligons presented to the Emergency Department at Crittenton with a four-day

history of vomiting, diarrhea, chills, and fever. She had a fever of 102.4. She had abdominal tenderness on examination. She had a WBC [white blood cell count] of 15,400. An abdominal x-ray showed an abnormal gas pattern with mildly dilated small bowel loops, and paucity of gas or bowel content in the colon. The report indicated that this could reflect early or partial bowel obstruction. The radiologist specifically recommended progress views. She was treated for gastroenteritis and dehydration. She was given antibiotics and fluids. She was discharged within six hours.

She went to Dr. Tayeb's office on the 23rd due to severe pain. She was immediately sent to the Emergency Department. Examination revealed changes consistent with peritonitis because of a perforated colon. She developed sepsis. Exploratory laparatomy revealed an extensive pelvic abscess, and surgical resection was not possible. Despite extensive medication, the sepsis that developed due to the perforated colon let to multiple organ failure and death on January 29, 2002.

In relevant part, the notice further set forth the following with respect to the requirements of MCL 600.2912d:

C. THE MANNER THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED:

u. Failed to admit the patient to the hospital on January 22, 2002;

v. Failed to obtain appropriate [consultations] on January 22, 2002 such as surgery and/or GI;

w. Failed to obtain progress x-rays of the abdomen and a CT scan on January 22, 2002 prior to discharging the patient;

x. Crittenton Hospital is responsible for it's [sic] employees and actual or ostensible agents involved in the treatment of Edris Ligons;

y. Crittenton Hospital negligently supervised their agents, servants and/or employees;

z. Crittenton Hospital negligently granted staff privileges to their agents, servants, and/or employees;

aa. Crittenton Hospital negligently hired their agents, servants, and/or employees;

bb. Rochester Emergency Group is responsible for the negligence of Dr. Bauer pursuant to respondeat superior;

cc. Dr. David Bauer is specifically responsible for Paragraphs a, c through n, q, r, t through w;

dd. Crittenton Hospital is responsible for all paragraphs not identified in bb.[1]

D. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE:

See paragraphs B and C above.

E. THE MANNER IN WHICH THE BREACH OF THE STANDARD OF PRACTICE OR CARE WAS THE PROXIMATE CAUSE OF THE INJURY CLAIMED IN THE NOTICE:

As a direct and proximate result of the negligence and malpractice alleged above Edis Ligons experienced conscious pain and suffering and ultimately died due to the negligence.

On April 7, 2006, plaintiff filed a complaint against Dr. Bauer, the P.C., and Crittenton Hospital. The complaint alleges that defendants were guilty of negligence and malpractice by failing to admit Ligons to the hospital on January 22, 2002, and by failing to obtain appropriate consultations on January 22, 2002. The complaint further alleges that as a result of the negligence and malpractice, Ligons suffered serious and permanent injuries resulting in her death on January 30, 2002.

Along with the complaint, plaintiff provided two affidavits of merit. One affidavit, signed by Dr. George Sternbach, set forth, in relevant part, the following

[1] I have omitted paragraphs a through t since they simply assert "boilerplate" language that could apply to any malpractice case.

actions that should have been taken or were omitted by the health professional/facility in order to have complied with the applicable standard of care:

> v. Admit the patient to the hospital on January 22, 2002;
>
> w. Obtain appropriate [consultations] on January 22, 2002 such as surgery and/or GI;[2]

Dr. Sternbach further stated that "[a]s a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, died." A second affidavit, signed by Dr. Fred Thomas, stated, "It is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate [consultations] on January 22, 2002, as outlined in Dr. Sternbach's affidavit that Edris Ligons would not have died."

On March 23, 2007, Dr. Bauer and the P.C. filed a motion for summary disposition pursuant to MCR 2.116(C)(7), asserting, in part, that the affidavits of merit did not comply with MCL 600.2912d(1). The trial court disagreed, concluding that the affidavits of merit were substantially in compliance with the statute, and entered an order denying the motion for summary disposition on May 22, 2007.

On appeal, Dr. Bauer and the P.C. argue that the affidavits of merit did not comply with MCL 600.2912d(1)(a) because they failed to articulate the applicable standard of care, and did not comply with MCL 600.2912d(1)(d) because they failed to set forth a sufficient statement of the manner in which the alleged breach of the standard of care was the proximate cause of the alleged injury. I disagree.

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[2] I have omitted paragraphs a through u since they simply assert "boilerplate" language that could apply to any malpractice case.

One affidavit of merit stated the applicable standard of care:

> The reasonable care, diligence and skill ordinarily and/or reasonably exercised and possessed by similarly staffed and equipped hospitals under the same or similar circumstances.
>
> The degree of reasonable care, diligence, learning judgment, and skill ordinarily and reasonably exercised and possessed by physicians/healthcare providers under the same or similar circumstances.

With regard to the issue of how the breach of the standard of care proximately caused decedent's injuries, the affidavit of merit signed by Dr. Sternbach stated, "As a direct and proximate cause of the imprudent acts and omission committed by the individual identified herein, Edris Ligons, died." The affidavit of merit signed by Dr. Fred Thompson stated, "It is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate [consultations] on January 22, 2002, as outlined in Dr. Sternbach's affidavit that Edris Ligons would not have died."

When reviewing the standard of care along with the relevant paragraphs listed under the heading relating to the manner the applicable standard of practice or care was breached, the affidavit of merit sufficiently informed Dr. Bauer and the P.C. regarding the applicable standard of practice or care as required by MCL 600.2912d(1)(a). The affidavit of merit was likewise critical of Dr. Bauer's failure to "[a]dmit the patient to the hospital on January 22, 2002" and "[o]btain appropriate [consultations] on January 22, 2002." Although the affidavits of merit do not specify how these inactions caused Ligons's death or how any of these actions could have prevented Ligons's death

eight days later, "there is no real guesswork in coming to the conclusion" that had these consultations been obtained, Dr. Bauer would have discovered the perforated colon and then surgery could have been performed on the colon. Under these circumstances, I would hold that the affidavits of merit were sufficient to comply with the statutory requirements and to satisfy the affidavit requirement's purpose of deterring frivolous medical malpractice claims by verifying through the opinion of a health professional that the plaintiff's claims are valid. *Barnett v Hidalgo*, 478 Mich 151, 163-164; 732 NW2d 472 (2007). To dismiss plaintiff's claim under these circumstances would be to elevate form over substance, which I decline to do.

BARNARD MANUFACTURING CO, INC v
GATES PERFORMANCE ENGINEERING, INC

Docket No. 286003. Submitted June 9, 2009, at Lansing. Decided August 18, 2009, at 9:05 a.m.

Barnard Manufacturing Co., Inc., brought an action in the Clinton Circuit Court against Gates Performance Engineering, Inc. (Performance Engineering), and Greg N. Gates (Gates), seeking to recover money for parts and services provided to the defendants. The defendants filed counterclaims against the plaintiff and third-party claims against third-party defendant Gary W. Barnard, the president of Barnard Manufacturing. Barnard Manufacturing moved for summary disposition regarding its claims and the claims brought by Performance Engineering and Gates. The court, Randy L. Tahvonen, J., granted Barnard Manufacturing's motion and thereafter denied Gates and Performance Engineering's motions for reconsideration, a stay, to amend the judgment, and for additional findings. Performance Engineering and Gates appealed.

The Court of Appeals *held*:

1. The appeal was timely filed under MCR 7.204(A)(1)(b) because the motions for relief from the order granting summary disposition were filed within 21 days of that order and the appeal was filed within 21 days of the denial of the final motion for relief.

2. Barnard Manufacturing's motion for summary disposition was sufficiently particular to put Gates and Performance Engineering on notice that they needed to respond to Barnard Manufacturing's claim that there was no genuine issue of fact regarding Barnard Manufacturing's claims of breach of contract and account stated. Barnard Manufacturing's submissions also adequately supported its motion with regard to its claims of breach of contract and account stated. The trial court properly considered the invoices submitted by Barnard Manufacturing. As long as there was a plausible basis for the admission of the invoices, Barnard Manufacturing did not have to lay a foundation for the admission of the invoices in order for the trial court to consider them on a motion for summary disposition.

3. Once Barnard Manufacturing made a properly supported motion for summary disposition under MCR 2.116(C)(10), the

burden shifted to Gates and Performance Engineering to establish that a genuine issue of disputed fact existed with regard to Barnard Manufacturing's claims. Gates and Performance Engineering failed to meet their burden of proof.

4. The trial court did not have a duty under MCR 2.116(G)(5) to independently consider all the evidence contained in the record before granting the motion for summary disposition. Gates and Performance Engineering had the burden of identifying the evidence in the record that would show that there was a genuine issue for trial. They failed to meet this burden. The trial court did not err by granting summary disposition and did not abuse its discretion by denying the motion to amend the judgment.

Affirmed.

MOTIONS AND ORDERS — SUMMARY DISPOSITION — BURDEN OF PROOF.

Once a party makes a properly supported motion for summary disposition under MCR 2.116(C)(10), the opposing party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in the court rules, set forth specific facts showing that there is a genuine issue of material fact for trial; the trial court does not have a duty to independently consider all the evidence in the record before granting the motion; the burden of identifying the issues and the evidentiary support is on the parties, not the trial court (MCR 2.116[G][3], [4], and [5]).

Clark Hill PLC (by *Matthew T. Smith*, *Cynthia M. Filipovich*, and *T. Blair Renfro*) for Barnard Manufacturing Co., Inc.

Lovejoy Law Offices, P.C. (by *Fred C. Lovejoy*), for Gates Performance Engineering, Inc., and Greg N. Gates.

Before: ZAHRA, P.J., and WHITBECK and M. J. KELLY, JJ.

M. J. KELLY, J. In this commercial dispute, defendants/counter-plaintiffs/third-party plaintiffs, Gates Performance Engineering, Inc. (Performance Engineering), and Greg N. Gates (Gates), appeal as of right the trial court's order of March 28, 2008. In its

order, the trial court granted summary disposition in favor of plaintiff/counter-defendant, Barnard Manufacturing Co., Inc. (Barnard Manufacturing), on its claim that Performance Engineering and Gates were liable for parts and services in the amount of $123,120.62. The trial court also dismissed Performance Engineering and Gates's counterclaims and third-party claims. On appeal, we must determine whether the trial court properly considered only the facts brought to its attention by the parties on the motion for summary disposition or whether the trial court had an independent duty to examine the entire record for facts that might establish grounds for denying Barnard Manufacturing's motion. We conclude that the trial court did not have an independent duty to examine the entire record for facts that might warrant denying the motion. Because the trial court properly granted summary disposition on the basis of the facts set forth by the parties and because there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

At his deposition, Gates testified that he is the sole shareholder and president of Performance Engineering, which he operates out of his garage. Gates stated that the majority of his work with Performance Engineering involves designing and manufacturing high performance motorcycle engines. However, he also stated that he does some repair work and has rebuilt motorcycle engines. Gates said that the majority of Performance Engineering's income was from the sale of motorcycle components and engines.

Gates testified that he previously worked for General Motors and that after 10 years he accepted a buyout. Gates said that when he accepted his buyout he was working as the leader of a design team. Although his primary duty was to ensure the quality of the designs produced by his team, Gates also did some design work.

Gates testified that he knew of Barnard Manufacturing, but did not have dealings with that company before being approached by Gary Mauer about a possible business deal with Mauer and Gary Barnard (Barnard). Gates stated that Mauer and Barnard came to his home and proposed that Gates join them to form a partnership that would manufacture motorcycle parts. Gates testified that they then began to meet regularly at one of Barnard Manufacturing's plants. Gates stated that Barnard did not, however, make the proposal on behalf of Barnard Manufacturing, but that it "was a personal thing." Gates testified that Mauer and Barnard wanted him for his design expertise. Gates said that the meetings usually involved discussions about the design and manufacture of motorcycle parts. Eventually, it was decided that the business venture would be called Evil Engineering. Gates stated that he contributed designs for various motorcycle parts that were to be sold by Evil Engineering. The parts included an oil filter, an oil filter cooler, and a belt drive system. Gates testified that he even designed the Evil Engineering logo featured on some of the parts. Gates testified that, at some point, he decided not to participate further in Evil Engineering.

Barnard testified at his deposition that he was the president of Barnard Manufacturing and that he also worked for Evil Engineering, LLC, which he stated was solely owned by Barnard Manufacturing. Barnard said that Mauer introduced him to Gates in 2003 or 2004 and that Gates approached him about manufacturing parts for Performance Engineering. Barnard admitted that he, Mauer, and Gates did discuss forming a business and had several meetings after hours at a Barnard Manufacturing facility. Barnard stated that the discussions involved producing parts for Performance Engineering, as well as what the proposed company—Evil Engineering—would do and some discussion of partici-

pating in trade shows. Barnard admitted that they intended to have Barnard Manufacturing make some of the parts for Evil Engineering. Barnard Manufacturing apparently formed Evil Engineering in 2005.

Although Barnard testified that Gates ordered a variety of parts and services from Barnard Manufacturing, he admitted that Barnard Manufacturing did not prepare invoices with regard to the parts or services or otherwise send a bill to Gates. Barnard explained that he discussed billing with Gates and agreed not to bill Gates until Performance Engineering started to generate sales. Barnard stated that he assumed that Barnard Manufacturing eventually sent Gates an invoice, but that he did not know for sure.

Gates testified that he never requested any work from Barnard Manufacturing, but that Barnard and Mauer requested designs for use with Evil Engineering. Gates also testified that Barnard volunteered to supply him with some parts. However, Gates admitted that he did request a price quote on some parts, but stated that he later rejected the quote as too high. Gates testified that Barnard Manufacturing never requested payment for any part or service.

On December 15, 2006, Barnard Manufacturing sued Gates and Performance Engineering to recover $123,120.62 for services and parts allegedly sold to Gates and his business. Barnard Manufacturing alleged that Gates and Performance Engineering were responsible for the services and parts under a variety of theories: breach of contract, account stated, quantum meruit, and conversion. Barnard Manufacturing attached a series of invoices to the complaint, which purported to describe the services performed and parts manufactured for Gates and Performance Engineering. Barnard Manufacturing also attached an affidavit in

which the affiant, who was apparently one of Barnard Manufacturing's attorneys, averred that the invoices correctly stated the amount due.

In February 2007, the trial court entered a default against Gates and Performance Engineering, but the trial court vacated the default in April 2007. Gates and Performance Engineering eventually filed counterclaims against Barnard Manufacturing and third-party claims against Barnard. Gates and Performance Engineering alleged that Barnard Manufacturing and Barnard interfered with a business relationship, misappropriated Gates's designs, made fraudulent misrepresentations, and breached a contract for the provision of services to Barnard Manufacturing and Barnard. Gates and Performance Engineering also alleged theories of recovery based on "cover" and quantum meruit.

In March 2008, Barnard Manufacturing moved for summary disposition in its favor with regard to its own claims and the claims raised by Gates and Performance Engineering under MCR 2.116(C)(10). On March 28, 2008, the trial court granted Barnard Manufacturing's motion. The trial court denied Gates and Performance Engineering's motion for reconsideration on April 16, 2008. Gates and Performance Engineering then filed a motion to stay, amend the judgment, and for additional findings on April 18, 2008. The trial court denied that motion on May 30, 2008. This appeal followed.

II. JURISDICTION

A. STANDARD OF REVIEW

As a preliminary matter, we shall address Barnard Manufacturing's contention that this appeal is untimely because it was not filed within 21 days of the trial court's April 16, 2008, order. This Court reviews de

novo questions of jurisdiction. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

B. APPEAL AS OF RIGHT

This Court generally has jurisdiction to hear appeals as of right that are filed within 21 days of a final order or judgment. MCR 7.204(A)(1)(a). However, if a party files a motion for a new trial, a motion for rehearing or reconsideration, or a motion "for other relief from the order or judgment" within 21 days of the final order or judgment, the appeal may be filed within 21 days of the order deciding that motion. MCR 7.204(A)(1)(b). Nothing in the court rules precludes a party from filing multiple postjudgment motions within this 21-day period. In their motion filed on April 18, 2008, which was within 21 days of the trial court's final order in this case, Gates and Performance Engineering requested forms of relief from the final order or judgment. Hence, they had 21 days from the date of the order denying that motion to file their appeal. *Id.* The trial court denied Gates and Performance Engineering's second motion on May 30, 2008, and Gates and Performance Engineering filed their appeal as of right on June 16, 2008. Because Gates and Performance Engineering filed their appeal within 21 days of the trial court's denial of the second motion, the claim was timely. See MCR 7.204(A)(1)(b).

III. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

On appeal, Gates and Performance Engineering challenge whether the trial court properly granted summary disposition in favor of Barnard Manufacturing on Barnard Manufacturing's claims against Gates and

Performance Engineering under MCR 2.116(C)(10).[1] This Court reviews de novo whether a trial court properly granted a motion for summary disposition. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008). This Court also reviews de novo the proper interpretation of court rules. *Estes*, 481 Mich at 578-579.

B. BARNARD MANUFACTURING'S MOTION FOR SUMMARY DISPOSITION

Gates and Performance Engineering first argue that the trial court should not have granted Barnard Manufacturing's motion with regard to Barnard Manufacturing's claims because Barnard Manufacturing failed to properly identify its own claims in its motion for summary disposition and failed to properly support its motion with admissible evidence.

Under MCR 2.116(C)(10), a party may be entitled to summary disposition if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . . ." When making a motion under MCR 2.116(C)(10), the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The level of specificity required under MCR 2.116(G)(4) is that which would place the nonmoving party on notice of the need to respond to the motion made under MCR 2.116(C)(10). *Quinto v Cross & Peters Co*, 451 Mich 358, 370; 547 NW2d 314 (1996). Further, the moving party must support its motion with affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted. MCR

[1] For that reason, we express no opinion about the propriety of the trial court's decision to dismiss Gates and Performance Engineering's counterclaims and third-party claims.

2.116(G)(3). If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto*, 451 Mich at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In its March 10, 2008, motion for summary disposition, Barnard Manufacturing argued that Gates and Performance Engineering's counterclaims and third-party claims should be dismissed on a variety of grounds. In addition, Barnard Manufacturing argued that there was no genuine issue of material fact regarding its own claims against Gates and Performance Engineering:

> Lastly, there is no genuine issue of material fact that [Gates and Performance Engineering] supplied drawings and other specifications to [Barnard Engineering's] employees with the understanding that [Barnard Engineering] would convert those drawings and specifications into manufactured goods and parts to be incorporated into high-end custom motorcycles. There is further no genuine issue of material fact that [Gates and Performance Engineering] received the [Barnard Manufacturing] produced manufactured goods and parts and neither paid for nor returned them. Additionally, [Gates and Performance Engineering] used and continue to use the very parts that [Gates and Performance Engineering] claim they did not receive. [Gates and Performance Engineering] are using the same parts that they claim they did not order and receive in their advertising. Thus, there is no genuine issue of material fact that [Gates and Performance Engineering] are liable to [Barnard Manufacturing] for the amount as

> stated on account, for the breach of contract, and or for the enrichment they unjustly received.

Notwithstanding the fact that Barnard Manufacturing failed to address its own claims under a separate heading and section, this language clearly put Gates and Performance Engineering on notice that they needed to respond to Barnard Manufacturing's claim that there was no genuine issue of fact regarding its claims of breach of contract and account stated.[2] Hence, Barnard Manufacturing moved for summary disposition with sufficient particularity. See MCR 2.116(G)(4); *Quinto*, 451 Mich at 370.

Although the evidentiary support could have been better organized and presented, Barnard Manufacturing's submissions also adequately supported its motion under MCR 2.116(C)(10) with regard to its claims of breach of contract and account stated. Throughout its brief in support of its motion for summary disposition, Barnard Manufacturing repeatedly argued that it provided services to and supplied Gates and Performance Engineering with parts for which Barnard Manufacturing had not received any compensation. It supported this contention with an affidavit by Barnard. In his affidavit, Barnard averred that he was the president of Barnard Manufacturing and that neither he, in his individual capacity, nor Barnard Manufacturing "ever used any design, product or part belonging to Gates" and never "contracted with Gates or requested Gates to provide designs, goods or services to myself or to [Barnard Manufacturing.]" He also averred that "it was

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[2] Although Barnard Manufacturing also referred to "enrichment" that was "unjust," it did not allege a claim for unjust enrichment in its complaint. Rather, its remaining claims were for conversion and quantum meruit. However, Barnard Manufacturing did not apparently move for summary disposition of its claims based on quantum meruit or conversion. Hence, these claims are not at issue.

[Barnard Manufacturing] that provided goods, labor and services for the design and manufacturing of parts for Gates and for which Gates has not paid for or returned but continues to use for Gates' own personal gain." Further, Barnard Manufacturing submitted several e-mails in which Gates appears to discuss design requirements for the manufacture of parts with persons at Barnard Manufacturing. Barnard Manufacturing also submitted invoices that purported to detail the services performed and parts sold to Gates and Performance Engineering on account and submitted advertisements that allegedly depict parts that were manufactured by Barnard Manufacturing and which Performance Engineering offered for sale to the general public. These submissions minimally establish that Gates, either individually or on behalf of Performance Engineering, ordered parts and services from Barnard Manufacturing, received those parts and services in the amounts specified in the invoices,[3] and failed to pay for the parts and services. Consequently, viewing this evidence alone, and in the light most favorable to Gates and Performance Engineering, Barnard Manufacturing would be entitled to summary disposition in its favor on its claims of breach of contract and account stated. *Quinto*, 451 Mich at 362-363.

On appeal, Gates and Performance Engineering argue that the trial court could not properly consider either the affidavit submitted with the invoices or the invoices themselves because the invoices were not sub-

[3] As attached to Barnard Manufacturing's brief in support of its motion for summary disposition, the invoices appear to be missing the last three pages, which included the page with the total amount due. However, the complete invoices were attached to Barnard Manufacturing's complaint and Barnard Manufacturing's attorney specifically referred the trial court to the invoices attached to the complaint at the summary disposition hearing.

stantiated or otherwise verified by an officer, director, or employee. We agree that the affidavit submitted with the invoices was not properly made on the personal knowledge of the affiant. See MCR 2.119(B)(1)(a). However, even assuming that the affidavit itself was not substantively admissible, the trial court nevertheless could still consider the invoices.

In ruling on Barnard Manufacturing's motion for summary disposition, the trial court could only consider substantively admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999). However, although the evidence must be substantively admissible, it does not have to be in admissible form. *Id.* at 124 n 6. " 'But it must be admissible in content . . . . Occasional statements in cases that the party opposing summary judgment must present admissible evidence . . . should be understood in this light, as referring to the content or substance, rather than the form, of the submission.' " *Id.*, quoting *Winskunas v Birnbaum*, 23 F3d 1264, 1267-1268 (CA 7, 1994).

On appeal, Gates and Performance Engineering do not argue that the invoices are inherently inadmissible; they argue that Barnard Manufacturing failed to lay a proper foundation for their admission. But Barnard Manufacturing did not have to lay the foundation for the admission of the invoices in order for the court to consider them on a motion for summary disposition as long as there was a plausible basis for the admission of the invoices. See *Maiden*, 461 Mich at 125 n 8; see also MCR 2.116(G)(6) (stating that the affidavits, depositions, admissions, and documentary evidence offered in support or opposition to a motion under MCL 2.116[C][10] may only be considered "to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion"). With a proper foundation, the

invoices *would* be admissible as records of regularly conducted activity. See MRE 803(6). Hence, the trial court properly considered the invoices, see MCR 2.116(G)(6); and the invoices, along with the other submissions noted above, were sufficient to support Barnard Manufacturing's motion with regard to its claims based on contract and account stated.

Once Barnard Manufacturing made a properly supported motion for summary disposition under MCR 2.116(C)(10), the burden shifted to Gates and Performance Engineering "to establish that a genuine issue of disputed fact exists" with respect to Barnard Manufacturing's claims. *Quinto*, 451 Mich at 362. In establishing the existence of a genuine issue of disputed fact, Gates and Performance Engineering could not rely on "mere allegations or denials" in their pleading, but had to, "by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). But Gates and Performance Engineering did not set forth specific facts showing that there was a genuine issue for trial on Barnard Manufacturing's claims. Indeed, in their brief opposing Barnard Manufacturing's motion for summary disposition, Gates and Performance Engineering only addressed the evidence in support of their counterclaims and third-party claims—they did not reference or attach a single piece of evidence for the proposition that there was a disputed fact concerning Barnard Manufacturing's claim of breach of contract or account stated. They also did not refer to any of the documents—including Gates's own deposition—that were attached to Barnard Manufacturing's brief in support of its motion. Likewise, at the hearing on Barnard Manufacturing's motion, Gates and Performance Engineering's attorney only briefly argued that summary disposition of Barnard Manufacturing's

claims would be inappropriate because Barnard Manufacturing failed to present evidence that Gates agreed to a price for the goods and services. However, the attorney did not offer or cite any evidence from the record or briefs to support his contention that Gates did not order the goods or services and did not offer or cite any evidence that Gates did not agree to the amounts charged in the invoices. Consequently, Gates and Performance Engineering's attorney essentially left Barnard Manufacturing's evidence completely unrebutted.[4] For that reason, Barnard Manufacturing was entitled to summary disposition of those claims. MCR 2.116(G)(4); *Quinto*, 451 Mich at 362-363.

C. INDEPENDENT DUTY TO REVIEW RECORD

Notwithstanding that they failed to set forth any facts establishing a genuine issue of disputed fact regarding Barnard Manufacturing's claims of breach of contract and account stated, Gates and Performance Engineering nevertheless argue that the trial court erred when it granted Barnard Manufacturing's motion for summary disposition on these claims. Gates and Performance Engineering argue that, under MCR 2.116(G)(5), the trial court had a duty to *independently* consider *all* the evidence contained in the court record

[4] On appeal, Gates and Performance Engineering essentially concede that their attorneys did not adequately respond to Barnard Manufacturing's motion for summary disposition. However, they argue that this Court should excuse this failure because their attorneys were inexperienced and were misled by opposing counsel's brief, which purportedly failed to put them on notice of the need to respond. As we have already noted, Barnard Manufacturing's brief—although deficient in many ways—adequately put Gates and Performance Engineering on notice of the need to respond with regard to Barnard Manufacturing's claims of breach of contract and account stated. Further, we do not agree that inexperience is a sufficient basis for excusing the failure to properly respond to a motion for summary disposition.

before it could grant the motion. Because the court record contained documents that established a question of fact with regard to Barnard Manufacturing's claims, Gates and Performance Engineering further argue, the trial court had to consider this evidence and, for that reason, should have denied Barnard Manufacturing's motion.

At first blush, MCR 2.116(G)(5) appears to support Gates and Performance Engineering's argument: "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." However, when construing court rules, this Court applies the same legal principles that govern the construction and application of statutes. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000). And it is well-settled that statutes—and accordingly court rules—that relate to the same person or thing, or the same class of persons or things, or which have a common purpose, should be read together as though constituting one law. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Thus, MCR 2.116(G)(5) must be construed in the context of the whole of MCR 2.116, which governs motions for summary disposition.

As already noted, MCR 2.116(G) generally governs the burden of production associated with a motion for summary disposition; and, consistently with our adversarial system, MCR 2.116(G)(4) squarely places the burden of identifying the issues and evidentiary support on the parties, not the trial court. See *Quinto*, 451 Mich at 362-363 (noting that Michigan's court rules employ a burden-shifting approach for motions for summary disposition). Accordingly, the moving party "must spe-

cifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and must support his or her belief with affidavits, depositions, admissions, or other documentary evidence, MCR 2.116(G)(3). Likewise, once a party makes a properly supported motion under MCR 2.116, the adverse party "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, *set forth specific facts* showing that there is a genuine issue for trial." MCR 2.116(G)(4) (emphasis added); see also *Maiden*, 461 Mich at 121 (stating that the "reviewing court should evaluate a motion for summary disposition under MCR 2.116[C][10] by considering the substantively admissible evidence actually proffered in opposition to the motion"). Because MCR 2.116(G)(4) places the burden to establish a genuine issue for trial on the adverse party, MCR 2.116(G)(5) cannot be construed to place a concomitant burden on the trial court to scour the lower court record in search of a basis for denying the moving party's motion. Instead, MCR 2.116(G)(5) must be understood to impose a limitation on the discretion of the trial court rather than impose an affirmative duty.[5] Accordingly, if a party refers to and relies on an affidavit, pleading, deposition, admission, or other documentary evidence, and that evidence is "then filed in the action or submitted by the parties," the trial court must consider it. MCR 2.116(G)(5);[6] see also *Capital Mortgage Corp v Michigan Basic Prop Ins*

[5] Indeed, if we were to construe MCR 2.116(G)(5) in the manner proposed by Gates and Performance Engineering we would effectively eviscerate the requirements of MCR 2.116(G)(4) and force the trial court to assume the role of the nonmoving party.

[6] Although this rule does not require the trial court to examine the record for evidence, it also does not prevent the trial court from examining the record for evidence.

Ass'n, 78 Mich App 570, 573; 261 NW2d 5 (1977) (concluding that, under GCR 1963, 117.2[3], which was substantially similar to MCR 2.116[G][5], the trial court could not refuse to consider documentary evidence properly filed by one of the parties).

We also find it persuasive that the majority of federal courts that have considered the issue have flatly rejected this argument under the analogous provisions of FR Civ P 56.[7] See, e.g., *Carmen v San Francisco Unified School Dist*, 237 F3d 1026, 1031 (CA 9, 2001); *Adler v Wal-Mart Stores, Inc*, 144 F3d 664, 672 (CA 10, 1998) ("Thus, where the burden to present such specific facts by reference to exhibits and the existing record was not adequately met below, we will not reverse a district court for failing to uncover them itself."); *Forsyth v Barr*, 19 F3d 1527, 1537 (CA 5, 1994) (noting that vague and conclusory assertions that the evidence demonstrates a question of fact are insufficient—the nonmoving party must identify specific evidence in the record); *L S Heath & Son, Inc v AT&T Information Sys, Inc*, 9 F3d 561, 567 (CA 7, 1993) (concluding that "a district court need not scour the record to determine whether there exists a genuine issue of fact to preclude summary judgment"); *Guarino v Brookfield Twp Trustees*, 980 F2d 399, 404 (CA 6, 1992) (stating that the appellants' "argument that the district court erred in not searching the record *sua sponte* is wholly without merit"). In addition, we conclude that such an interpretation would not be consistent with the requirement that our court rules be "construed to secure the just, speedy, and economical determination of every action . . . ."

[7] Because our court rules are patterned after the federal court rules, see *Shields v Reddo*, 432 Mich 761, 784; 443 NW2d 145 (1989), in the absence of state authority, this Court may consider federal authorities that interpret analogous provisions of the federal rules. See *Bush v Beemer*, 224 Mich App 457, 461; 569 NW2d 636 (1997).

MCR 1.105. As the Court in *Carmen* explained, the reading preferred by Gates and Performance Engineering would be both inefficient and unfair:

> A substantial number of cases have records that fill a drawer or two of a filing cabinet, and some big cases sometimes fill multiple five-drawer file cabinets in the clerks' offices. A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.
>
> * * *
>
> Requiring the district court to search the entire record for a genuine issue of fact, even though the adverse party does not set it out in the opposition papers, is also profoundly unfair to the movant. The gist of a summary judgment motion is to require the adverse party to show that it has a claim or defense, and has evidence sufficient to allow a jury to find in its favor on that claim or defense. The opposition sets it out, and then the movant has a fair chance in its reply papers to show why the respondent's evidence fails to establish a genuine issue of material fact. If the district court, or later this court, searches the whole record, in practical effect, the court becomes the lawyer for the respondent, performing the lawyer's duty of setting forth specific facts showing that there is a genuine issue for trial. The movant is then denied a fair opportunity to address the matter in the reply papers. Unless the court holds oral argument and brings up the fruit of its search, the movant never receives notice and an opportunity to be heard on the critical evidence. If given an opportunity, the movant might sometimes be able to show that the appearance of a genuine issue of fact was illusory. [*Carmen*, 237 F3d at 1030-1031.]

For these reasons, we reject Gates and Performance Engineering's preferred reading of MCR 2.116(G)(5).

D. APPLICATION TO THE FACTS

After taking the extra time to examine the record in detail, we agree that there was evidence in the record that could have been used to establish a question of fact regarding whether Gates or Performance Engineering entered into a contract for services or parts from Barnard Manufacturing or otherwise agreed to pay Barnard Manufacturing a sum certain. Indeed, at his deposition, Gates testified that he submitted his designs to Barnard and other employees at Barnard Manufacturing as part of ongoing efforts to form Evil Engineering and that the majority of the parts were made for Evil Engineering. He also testified that Barnard Manufacturing never billed him for the parts or services, that he never agreed to a specific price for any parts or services, and that Barnard told him not to worry about paying for those parts that were made for Gates's personal use. Nevertheless, Gates and Performance Engineering failed to cite or otherwise refer to Gates's deposition testimony in their brief in response to the motion for summary disposition or orally at the motion hearing. Likewise, even though Barnard Manufacturing attached Gates's deposition to its brief in support of its motion for summary disposition, it did not refer the trial court to the relevant testimony and there is no indication that the trial court elected to consider those sections on its own initiative. See *L S Heath & Son, Inc*, 9 F3d at 567 (noting that the trial court has the discretion to consider record evidence on its own initiative). When reviewing a motion for summary disposition, this Court's review is limited to review of the evidence properly presented to the trial court.[8] See

[8] There is no evidence on the record that the trial court exercised its discretion to consider any documents other than those cited by the parties at the time it granted Barnard Manufacturing's motion for

Quinto, 451 Mich at 366 n 5; *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003); see also *Skotak v Tenneco Resins, Inc*, 953 F2d 909, 915-916 (CA 5, 1992) ("Although on summary judgment the record is reviewed *de novo*, this court, for obvious reasons, will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the motion."); *Guarino*, 980 F2d at 404 ("This Court will not entertain on appeal factual recitations not presented to the district court any more readily than it will tolerate attempts to enlarge the record itself."). Hence, we are not at liberty to consider this evidence.

The trial court was not obligated under MCR 2.116(G)(5) to "scour the record to determine whether there exists a genuine issue of fact" to preclude summary disposition. *L S Heath & Son, Inc*, 9 F3d at 567. Rather, Gates and Performance Engineering had the obligation to "set forth specific facts showing that there is a genuine issue for trial," MCR 2.116(G)(4), which they did not do. Consequently, given the evidence actually raised by the parties and considered by the trial court, we cannot conclude that the trial court erred when it granted Barnard Manufacturing's motion for summary disposition.

IV. MOTION TO AMEND JUDGMENT

Gates and Performance Engineering next argue that the trial court abused its discretion when it denied the relief requested in their motion to amend the judgment. This Court reviews a trial court's decision to deny such

summary disposition. Had the trial court considered evidence contained in the record, but not cited by the parties, that evidence would be part of our review. See *L S Heath & Son, Inc*, 9 F3d at 567.

a motion for an abuse of discretion. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

Gates and Performance Engineering first contend that the trial court should have granted the requested relief because Barnard Manufacturing clearly failed to establish its entitlement to summary disposition under the court rules. However, as already noted in this opinion, Barnard Manufacturing adequately supported its motion and the trial court properly granted the motion after Gates and Performance Engineering failed to "set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Hence, the trial court did not abuse its discretion when it refused to grant the motion on this basis.

Gates and Performance Engineering also argue that the trial court and opposing counsel each engaged in inappropriate conduct, which the trial court should have realized warranted relief. According to Gates and Performance Engineering, the trial court committed misconduct by failing to search the lower court record for evidence that might justify denying Barnard Manufacturing's motion. In the same vein, they argue that Barnard Manufacturing's attorney committed misconduct by arguing that Barnard Manufacturing was entitled to summary disposition of its claims and by failing to make the trial court aware of the record evidence that might be construed to contradict that position. Thus, Gates and Performance Engineering essentially fault the trial court and opposing counsel for failing to advocate on behalf of Gates and Performance Engineering. However, neither the trial court nor Barnard Manufacturing's attorney had a duty to advocate on behalf of Gates or Performance Engineering. Under our adversarial system, each party bears the responsibility for ensuring that its positions are vigorously and prop-

erly advocated. See *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987) (noting that, in our adversarial system, the litigants frame the issues and present them to the court); *Mack v Detroit*, 467 Mich 186, 223; 649 NW2d 47 (2002) (CAVANAGH, J., dissenting) (stating that, under our adversarial system the "parties frame the issues and arguments" for the trial court, which ensures "the best presentation of arguments and theories because each party is motivated to succeed"). And neither the trial court nor Barnard Manufacturing's attorney can be faulted for Gates and Performance Engineering's attorneys' failure to properly defend against Barnard Manufacturing's motion for summary disposition.

The trial court did not abuse its discretion when it declined to grant Gates and Performance Engineering's motion to amend the judgment.

There were no errors warranting relief.

Affirmed. As the prevailing party, Barnard Manufacturing may tax costs under MCR 7.219(A).

In re HANDORF

Docket No. 290101. Submitted August 11, 2009, at Detroit. Decided August 18, 2009, at 9:10 a.m.

Joseph and Margo Eby, who are the guardians of Brandon Handorf, filed a motion in the Livingston County Probate Court for authority to consent to their own adoption of Brandon. Brandon's legal father, Eric J. Labo, was amenable to the adoption, but Brandon's mother, Monica G. Labo, was not. The court, Carol Hackett Garagiola, J., denied the motion, ruling that it could only grant the Ebys' motion if the parental rights of the Labos were terminated first or the Labos consented. The court certified the order under MCR 5.801(F) as involving a controlling question of law for which a direct appeal to the Court of Appeals might materially advance the ultimate termination of the litigation. The Court of Appeals granted the Ebys leave to appeal.

The Court of Appeals *held*:

The probate court properly denied the motion. The first step in the adoption process is ensuring that the child is freed for adoption. Absent parental consent, the first prerequisite for adoption is termination of the parental rights of the child's parents. Until termination takes place, consideration of MCL 710.43 and MCL 700.5215(e), which permit guardians to consent to their wards' adoption, is premature.

Affirmed and remanded for further proceedings.

ADOPTION — GUARDIAN AND WARD — CONSENT TO ADOPTION BY GUARDIANS — TERMINATION OF PARENTAL RIGHTS.

Before a guardian may consent to the adoption of his or her ward, the parents of the ward must consent to the adoption or their parental rights must be terminated (MCL 700.5215[e], 710.41[1], 710.43[1][e] and [5]).

Monica J. Copeland for Joseph and Margo Eby.

Before: CAVANAGH, P.J., and MARKEY and DAVIS, JJ.

DAVIS, J. Petitioners, Joseph and Margo Eby, appeal by leave granted an order denying their motion to allow them to consent—as the guardians of Brandon Gavin Handorf—to their own adoption of Brandon. Respondents, Monica Grace Labo and Eric James Labo, are Brandon's biological mother and legal father. We affirm and remand for any further proceedings the probate court determines are necessary or appropriate.

Brandon was born while Monica was incarcerated. He was placed with petitioners three days later. Petitioners were initially made temporary guardians over Monica's objection, and they were eventually appointed as full guardians. The probate court ordered a court-structured plan to reintegrate Brandon with respondents. Monica was required to comply with several conditions, including regular drug testing, obtaining stable housing and employment, and participating in counseling. Eric had no contact with Brandon, and although Monica initially made regular contact, she began missing appointments. Monica generally failed to fulfill the requirements. The court asked the Department of Human Services to investigate termination proceedings, but the department did not do so. Meanwhile, Brandon did well in petitioners' custody.

Petitioners eventually sought to adopt Brandon. Eric was apparently amenable to this and, indeed, desired no contact with Brandon and wished to be released from any parental obligations. Monica was not amenable. Petitioners moved to be granted the authority, as Brandon's guardians, to consent to their own adoption of Brandon. The probate court considered the matter and concluded, correctly, that it could only grant petitioners' request if the parental rights of Brandon's parents were first terminated. The probate court further concluded that unless Brandon's parents consented, it

lacked the authority under the guardianship statutes to grant petitioners' motion. The probate court certified this order under MCR 5.801(F), and this Court granted leave to appeal.

We initially note that there is no published authority in Michigan directly on point, and the unpublished opinions from this Court are in conflict.[1] In *In re Partello*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 1998 (Docket No. 202757), the petitioner, Christina Partello, gave birth to a child at the age of 16, consented to having her mother, Sandra Waukazoo, appointed as the child's guardian, and proceeded to generally fail to act as a competent parent. Five years later, Partello petitioned the probate court for an order to terminate the guardianship, and Waukazoo petitioned the probate court for an order granting her the authority to consent to the child's adoption by another couple, the Smiths. The probate court denied the motion to terminate the guardianship. After observing that the order granting authority to consent to the adoption would have the effect of terminating Partello's parental rights, the probate court found that doing so was in the child's best interests and granted Waukazoo's petition. A panel of this Court affirmed, observing that the evidence clearly supported the probate court's determination that termination was appropriate. Conversely, however, in *In re Blaylock*, unpublished memorandum opinion of the Court of Appeals, issued December 28, 2001 (Docket No. 234755), another panel of this Court held that the guardians did not have the power to consent to the adoption of their ward, nor could they carry out that adoption, without

[1] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

the consent of the parents "or tak[ing] the steps necessary to obtain the termination of their parental rights." We agree with and adopt the holding of *Blaylock*.

Petitioners argue that guardians may consent to adoptions of their wards. This assertion is generally correct, subject to authorization by the court and the requirements of MCL 710.44 and MCL 710.51. See MCL 710.43(1)(e) and (5). However, the "first step in the adoption process is ensuring the child is freed for adoption." Michigan Judicial Institute, Adoption Proceedings Benchbook 2003-2008, p 2-2.[2] Subject to exceptions not at issue here,

> a child shall not be placed in a home for the purpose of adoption until an order terminating parental rights has been entered pursuant to [the Michigan Adoption Code, MCL 710.21 *et seq*.] or [the Michigan juvenile code, MCL 712A.1 *et seq*.] and the court has formally approved placement under [MCL 710.51]. [MCL 710.41(1).]

Unless there is parental consent[3] to the adoption, an adoption petition must be accompanied by, among other things, "a copy of each release[4] or order terminating parental rights over the child having a bearing upon the authority of a person to execute the consent to adoption." MCL 710.26(1)(a).

Therefore, we agree with the probate court's conclusion that the *first* prerequisite for adoption is termination of the parental rights of the child's parents (in the

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[2] Available online at <http://courts.michigan.gov/mji/resources/adoption/adoption.htm>.

[3] " 'Consent' means a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent." MCL 710.22(*l*).

[4] " 'Release' means a document in which all parental rights over a specific child are voluntarily relinquished to the department or to a child placing agency." MCL 710.22(u).

absence of the parent's or parents' consent). This is consistent with the purpose of adoption in Michigan, which is "severing, at law, the prior, natural family relationships and creating a new and complete substitute relationship after adoption." *Bikos v Nobliski*, 88 Mich App 157, 165; 276 NW2d 541 (1979), superseded on other grounds as discussed in *Jones v Slick*, 242 Mich App 715, 723-725; 619 NW2d 733 (2000). Until that termination takes place, consent to the *adoption* is irrelevant because the child is not available for adoption. We do not find any provision in the Michigan Adoption Code under which a guardian may simply agree to the termination of parents' parental rights.[5] As a consequence, any consideration or application of the language in MCL 710.43 and MCL 700.5215(e) permitting guardians to consent to their wards' adoption is premature.

The probate court properly denied petitioners' motion upon its correct determination that Brandon had not been freed for adoption because the parental rights of Brandon's parents had not been terminated. We therefore affirm, and we remand the matter to the probate court for any further proceedings that the probate court determines are necessary or appropriate. We do not retain jurisdiction.

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[5] A guardian may release a child with the authorization of the court. MCL 710.28(1)(d) and (3). But because that release may "be given only to a child placing agency or to the department," MCL 710.28(5), those provisions are irrelevant in the instant matter.

CAIGER v OAKLEY

Docket No. 285549. Submitted June 2, 2009, at Lansing. Decided August 25, 2009, at 9:00 a.m.

Donald A. Caiger brought an action in the St. Clair Circuit Court against Jason A. Oakley, Port Huron Auto Glass, and Farmers Insurance following an automobile accident involving a van owned by Port Huron Auto Glass and driven by Oakley. The plaintiff settled with Farmer Insurance. The plaintiff had hyperextended his knee in the accident, had arthroscopic surgery on the knee, and eventually had knee replacement surgery. The plaintiff sought noneconomic damages from the remaining defendants for the knee injury. The court, Daniel J. Kelly, J., granted summary disposition for those defendants, ruling that assuming that the knee injury was related to the automobile accident, the plaintiff had not shown that he sustained a serious impairment of body function that entitled him to noneconomic damages under the no-fault act. The plaintiff appealed.

The Court of Appeals *held*:

1. Pursuant to MCL 500.3135 of the no-fault act, a person is subject to tort liability for noneconomic loss caused by his or her use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(7) defines "serious impairment of body function" as an "objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

2. The plaintiff, at a minimum, presented a question of fact concerning whether his knee problems resulted from, or were exacerbated by, the accident. The plaintiff introduced a letter from his physician and a surgical note indicating that the accident more likely than not caused the pain in the plaintiff's knee that resulted in total knee arthroplasty.

3. The trial court erred by ruling that the plaintiff had not suffered a threshold injury. The plaintiff showed that he suffered an impairment of an important body function and that the impairment was objectively manifested. The plaintiff further demonstrated that his general ability to conduct his normal life had

been affected. The plaintiff suffered pain, underwent major surgery, experienced difficulty walking after surgery, and continues to suffer residual pain. The plaintiff had to forgo both his occupation as a commercial painter and his woodworking hobby as a result of his knee injury.

Reversed and remanded for further proceedings.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Paul B. Addis*, *Albert B. Addis*, and *David K. Pontes*) for Donald A. Caiger.

Fletcher Fealko Shoudy & Moeller, P.C. (by *William L. Fealko*), for Jason A. Oakley and Port Huron Auto Glass.

Before: OWENS, P.J., and SERVITTO and GLEICHER, JJ.

OWENS, P.J. Plaintiff appeals as of right the trial court's grant of summary disposition for defendants Jason Oakley and Port Huron Auto Glass in this automobile negligence claim.[1] We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On May 10, 2005, plaintiff was in an automobile accident with Oakley, who was driving a van owned by his employer, Port Huron Auto Glass. Plaintiff went to the hospital. He reported soreness throughout his body. Thereafter, he began experiencing pain in his right knee. Plaintiff suffered from hyperextension of the knee, and stated that he "would fall backwards when [he] was walking." A magnetic resonance imaging (MRI) revealed a meniscal tear. Plaintiff underwent arthroscopic surgery on July 22, 2005. After the surgery, the pain diminished in intensity, but plaintiff's knee continued to hyperextend. This hyperextension, and the pain associated with it, led plaintiff's physician to perform knee replacement surgery on plaintiff on April 20, 2006.

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[1] Defendant's claim against defendant Farmers Insurance was settled, and Farmers Insurance is not a party to this appeal.

Plaintiff filed suit, seeking first-party benefits from Farmers Insurance and noneconomic damages from defendants. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's knee problems were not related to the accident and that even if they were, they did not constitute a substantial impairment of body function. The trial court granted defendants' motion. The trial court held that, even were it to consider plaintiff's knee injuries to be accident-related, plaintiff had not shown that he suffered a threshold injury. The trial court found that plaintiff had essentially abandoned his painting career for financial reasons and that plaintiff could find other employment, even with the physician-imposed restrictions placed on him by independent medical examiners. The trial court also found that plaintiff led the same life he did before the accident, albeit with minor restrictions.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Pursuant to MCL 500.3135, a person is subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. A "serious impairment of body function" is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

Under *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004), the reviewing court is to determine whether a factual dispute exists "concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination

whether the person has suffered a serious impairment of body function." If a factual dispute exists, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, the question is one of law. *Id.* at 132.

When a court decides the issue as a matter of law, it must then proceed to the second step in the analysis and determine whether "an 'important body function' of the plaintiff has been impaired." *Id.* When a court finds an objectively manifested impairment of an important body function, "it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* This process involves an examination of the plaintiff's life before and after the accident. The court should objectively determine whether any change in lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at 133. "Merely 'any effect' on the plaintiff's life is insufficient because a de minim[i]s effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life." *Id.* The *Kreiner* Court provided a nonexclusive list of objective factors that may be used in making this determination. These factors include

> (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. [*Id.*]

In addition, "[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person's overall life." *Id.* at 131. Thus, where limitations on sporting activities "might not rise to the level of a serious impairment of body function for some people, in a person who regularly

participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function." *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005). However, "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Kreiner*, *supra* at 137.

Specifically in regard to residual impairments, the *Kreiner* Court noted, "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point." *Id.* at 133 n 17. However, this Court has held that "[t]he necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment." *McDanield v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id*. at 284. In addition, this Court has recognized the difference between self-imposed limitations because of pain and self-imposed limitations based on physical inability, which can support a finding that the plaintiff has suffered a threshold injury. *Id*.

We hold that the trial court erred by granting defendants' motion for summary disposition.

Defendants argue that plaintiff presented no evidence that his knee problems resulted from the accident, or were exacerbated by it. Plaintiff argues that at a minimum, he presented a question of fact concerning this issue. We agree with plaintiff. Plaintiff presented a

letter from his physician that stated in pertinent part that the car accident "more likely than not caused the pain in [plaintiff's] knee which resulted in total knee arthroplasty."[2] This is consistent with a statement concerning the source of the injury in another surgical note presented by plaintiff.

The trial court erred when it found that, even if plaintiff demonstrated that his knee injury was caused or exacerbated by the accident, plaintiff could not meet the test of establishing a threshold injury. Plaintiff showed that he suffered an impairment of an important body function and that this impairment was objectively manifested. Plaintiff has further demonstrated that his general ability to conduct the course of his life has been affected.

Plaintiff suffered pain for a year after the accident, was forced to undergo major reconstructive surgery, and had great difficulty walking for seven weeks following the surgery. He underwent physical therapy from the surgery until October of 2006. Thus, the "nature and extent of the impairment" and "the type and length of treatment required" factors involved in this case support plaintiff's position that he suffered a threshold injury. Plaintiff suffers continued, and presumably permanent, residual effects. Although plaintiff's level of pain has apparently diminished since the knee replacement surgery, he still reports discomfort that occurs five or six times each day.

The trial court correctly noted that plaintiff had ended his career as a commercial painter because of financial reasons; however, painting was still plaintiff's

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[2] Defendants' assertion on appeal that this evidence was not properly submitted to the trial court is contradicted both by defendants' attorney's statements during the motion hearing regarding the receipt of this material and plaintiff's facsimile transmission records.

trade and he has now lost the option of returning to that trade in better economic times. One of plaintiff's physicians stated that plaintiff was employable in a career that involved "no repetitive bending or prolonged standing." This restriction would prevent plaintiff from returning to work as a painter. Furthermore, plaintiff formerly enjoyed woodworking, including restoring cabinetry, and had been offered a contract to restore the cabinets in a house, but could not do so because of the accident. He claimed that he could no longer participate in this activity because he could not walk up and down to varnish pieces of wood.

Plaintiff's injury caused him to have to make a decision between a lifetime of knee hyperextensions resulting in "sharp screaming pain" and having his knee joint replaced with synthetic parts. While the knee replacement has led to some improvement in his ability to function, plaintiff is still missing a portion of his body that he will never retrieve. Plaintiff must forever depend on an artificial joint for his mobility and continues to suffer from chronic pain in his knee that will prevent him from returning to work in his previous occupation and prevents him from enjoying his woodworking hobby.

Therefore, we conclude that, as required by MCL 500.3135, plaintiff has established an objectively manifested impairment of an important body function and has also established that the impairment affects his general ability to lead his normal life.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

JANSON v SAJEWSKI FUNERAL HOME, INC

Docket No. 284607. Submitted August 12, 2009, at Detroit. Decided August 25, 2009, at 9:05 a.m.

Thomas Janson brought an action in the Wayne Circuit Court against Sajewski Funeral Home, Inc., seeking damages for injuries sustained when he slipped and fell on black ice in the defendant's parking lot. The court, Cynthia D. Stephens, J., granted summary disposition for the defendant, concluding that the icy conditions on the defendant's parking lot were open and obvious and that black ice presented no special aspects that would preclude the application of the open and obvious danger doctrine. The plaintiff appealed.

The Court of Appeals *held*:

The defendant's argument that black ice in Michigan is an open and obvious danger as a matter of law must be rejected. In the absence of other, visible indicia of the otherwise invisible hazard, black ice, by itself, cannot be open and obvious. Nothing in the record indicates that the plaintiff saw any ice in the parking lot or observed anyone else slip on the parking lot, and there was no snow around the area where the plaintiff fell. There was no evidence that there were visible indicia of the presence of black ice. The trial court erred by applying the open and obvious danger doctrine. The order granting summary disposition must be reversed, and the case must be remanded to the trial court for further proceedings.

Reversed and remanded.

NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — BLACK ICE.

A premises possessor is generally not required to warn an invitee of open and obvious dangers; black ice, in the absence of some other, visible indicia of the otherwise invisible hazard that it presents, is not by itself an open and obvious danger.

Levine, Benjamin, Tushman, Bratt, Jerris & Stein, P.C. (by *Greg M. Liepshutz*) (*Daryl Royal*, of counsel), for the plaintiff.

Garan Lucow Miller, P.C. (by *Sarah E. Robertson*), for the defendant.

Before: CAVANAGH, P.J., and MARKEY and DAVIS, JJ.

DAVIS, J. Plaintiff appeals as of right from an opinion and order granting summary disposition in favor of defendant. We reverse and remand.

This case arises out of plaintiff's slip and fall on black ice in defendant's parking lot. The injury took place in the early evening on March 2, 2006. There had been light precipitation earlier in the day and temperatures had been below freezing all day. The roads were clear, although a witness testified that they had been icy in the morning and salt trucks had been operating. Defendant's parking lot had been largely cleared of snow, and it had been salted in the morning because it had been icy. By the afternoon, defendant's operator believed that there was no ice remaining on the lot. A witness testified that he had difficulty walking on the lot because of patches of black ice "everywhere in the parking lot" shortly before plaintiff's fall. At approximately 6:15 p.m., plaintiff parked his car at the far end of the parking lot because the lot was almost full. Plaintiff had been to defendant's funeral home numerous times previously.[1] Plaintiff walked approximately three-quarters of the way from his car to the entrance then slipped and fell. Plaintiff testified that the area where he fell was a slippery patch of ice five- to six-feet wide and that he encountered no other ice on the lot. Defendant's operator did not "see any ice per se," but found the area of the fall "a little bit on the slick side."

[1] Plaintiff testified that the Veterans of Foreign Wars organization customarily held memorial services for deceased veterans at defendant's funeral home. Plaintiff, a retired command sergeant major of the United States Army, attended such memorial services regularly.

A witness to plaintiff's fall, Phillip Steven Merrow, believed that plaintiff slipped on one of the patches of ice in the parking lot. Plaintiff fractured his right ankle.

At issue in this appeal is whether the trial court correctly granted summary disposition in defendant's favor, concluding that the icy conditions on defendant's parking lot were open and obvious and that black ice possessed no special aspects that would preclude application of the open and obvious danger doctrine. A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We conclude that the trial court erred.

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski ex rel Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). Plaintiff was an invitee on defendant's premises, so defendant owed plaintiff a duty of care to warn of any known dangers, use reasonable care to prepare the premises and make them safe, and, if applicable, effectuate necessary repairs. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007); *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). However, an invitor generally need not warn invitees of "open and obvious" dangers. If the danger and the risk therefrom would be readily apparent to an ordinary person upon casual inspection, issuing a warning is usually pointless. See *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478-479; 760 NW2d 287 (2008). But an exception to the "open and

obvious" danger doctrine is where "special aspects" make a condition either effectively unavoidable or pose an unreasonably high risk of severe harm. *Id*.

We initially reject defendant's argument that black ice in Michigan is an open and obvious danger as a matter of law. In fact, very nearly the opposite is true: the "overriding principle" behind "many definitions" of black ice is its invisibility, which is "inherently inconsistent with the open and obvious danger doctrine." *Id*. at 483. Rather, several cases have held that ice may be open and obvious under some circumstances where *other facts* present should have alerted a Michigan resident to the likelihood of the hazard. Precedent from this Court and from our Supreme Court has explained that a long-term Michigan resident should be aware that ice might lurk under snow or after certain kinds of weather conditions,[2] that observing other people slipping on a surface should constitute a warning that the surface is slippery, and that ordinary ice may well be visible. See *Ververis v Hartfield Lanes* (*On Remand*), 271 Mich App 61, 65-67; 718 NW2d 382 (2006). But in the absence of some other, visible indicia of an otherwise-invisible hazard, black ice per se simply cannot be "open and obvious." See *Slaughter*, *supra* at 483.

In this case, weather records and testimony indicated that the temperature remained below freezing on the day of the incident, but the precipitation was light and had tapered off earlier that day. Plaintiff testified that the roads leading to defendant's funeral home were clear. Defendant's parking lot also appeared to be clear. Plaintiff testified that he had not encountered any

[2] We have not found any published authority suggesting whether a resident of any other state, or a Michigan resident who had not lived in Michigan for any great length of time, would also be expected to predict ice underneath snow or understand the vagaries of Michigan weather.

other patches of ice in defendant's parking lot before his fall. Defendant's operator testified that he salted the parking lot and that the area where plaintiff fell seemed slippery even though he did not see any ice there. Merrow testified that there were patches of ice throughout the parking lot and that although he encountered them, he did not see any of them. We find nothing in the record to show that plaintiff saw anyone else slip on the parking lot surface, nor do we find any indication that there was any snow around the area where plaintiff fell. Given these facts, it would be inappropriate to apply the open and obvious danger doctrine.

Given our conclusion that the trial court erred by applying the open and obvious danger doctrine, we need not consider whether any special aspects of the situation would otherwise have precluded the doctrine's application.

Reversed and remanded. We do not retain jurisdiction.

PEOPLE v BUIE

Docket No. 278732. Submitted January 7, 2009, at Grand Rapids. Decided August 25, 2009, at 9:10 a.m.

A jury in the Kent Circuit Court, Dennis B. Leiber, J., convicted James H. Buie of two counts of first-degree criminal sexual conduct involving a victim under the age of 13, three counts of first-degree criminal sexual conduct involving the use of a weapon, and possession of a firearm during the commission of a felony. The defendant appealed, alleging, in part, that he was deprived of his constitutional right to confront the witnesses against him when two nonvictim, prosecution witnesses were allowed to testify by way of two-way, interactive video technology.

The Court of Appeals *held*:

1. The required elements of the Confrontation Clause of the Sixth Amendment are physical presence, an oath, cross-examination, and observation of demeanor by the trier of fact. However, the right of the accused to meet witnesses face-to-face is not absolute and the Confrontation Clause simply reflects a preference for face-to-face confrontation at trial. This preference must occasionally give way to considerations of public policy and the necessities of the case. Before a trial court may allow the taking of a witness's testimony through two-way, interactive video technology, the trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all the other elements of the Confrontation Clause.

2. The trial court in this case failed to make the case-specific findings regarding the necessity of the videoconferencing procedure implemented. The case must be remanded to the trial court to hear evidence and make case-specific findings regarding whether the procedure was necessary to further a public policy or state interest important enough to outweigh the defendant's confrontation rights.

3. MCR 6.006(C)(2) permits a trial court to take witness testimony by two-way, interactive video technology if the defendant is either present in the courtroom or has waived the right to

be present, there is a showing of good cause, and the parties consent. There was no showing of good cause in this case and no showing that the defendant consented to the procedure. In fact, the defendant objected to the procedure. The defendant did not waive his right to confront the two prosecution witnesses.

Remanded for further proceedings consistent with the opinion of the Court of Appeals and its accompanying order.

CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — TRIAL — WITNESSES — TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY.

A trial court, before it may allow the taking of a witness's testimony through two-way, interactive video technology, must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves the other elements of the Confrontation Clause that require an oath, cross-examination, and observation of demeanor by the trier of fact.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Jonathan Sacks*) for the defendant.

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM. Defendant James H. Buie appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC) involving a victim under the age of 13, MCL 750.520b(1)(a), three counts of first-degree CSC involving the use of a weapon, MCL 750.520b(1)(e), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to life imprisonment for his CSC convictions and two years' imprisonment for his felony-

firearm conviction. We remand for further proceedings consistent with this opinion.

I

On June 27, 2001, defendant entered a house in Grand Rapids, Michigan, and sexually assaulted BS and minors LS, age 13, and DS, age 9. At the time of the incident, LS and DS lived in the house with their mother, their two brothers, and their mother's roommate. BS, who was a close family friend, was at the house that night to babysit the children while their mother was out. LS and DS's mother testified that she knew that BS had used cocaine in the past, but believed that BS was "clean" when she asked her to watch the children. BS later admitted, however, that she was still using cocaine at the time of the incident.

BS arrived at the house at approximately 7:00 p.m. Between 1:00 and 2:00 a.m., she went and sat down on the front porch. BS initially reported that defendant forced her back inside the house at gunpoint. According to BS's trial testimony, however, defendant approached her while she was seated on the porch. He asked to use a telephone. BS consented and allowed defendant to enter the house. She then propositioned defendant to exchange sexual favors for cocaine and led him into a large closet. Once inside the closet, defendant pointed a gun at BS's head and penetrated her vagina with his penis. He also attempted to penetrate her anally.

During the assault, BS heard the roommate of the minor's mother at the front door. After the roommate entered the house, defendant struck him in the head with a gun. The roommate fell to the floor, unconscious. At that point, LS, DS, and the other two children entered the room. LS and DS testified that they saw defendant

holding a gun to BS's head. Defendant then ordered BS and all four of the children to enter the closet and lie down.

According to LS, defendant subsequently moved her from the closet to the couch. Once on the couch, defendant penetrated her vagina with his penis. During the assault, defendant told LS that he loved her and that if she tried to escape, he would kill her family. Defendant assaulted LS again in her bedroom and in the kitchen. At some point, he attempted to penetrate her anally. After the assault in the kitchen, defendant took LS back to the couch and told her to put her head down. Defendant then moved DS from the closet to the kitchen. According to DS, defendant penetrated her vagina with his penis. LS remained on the couch with her head down and could hear DS crying in the kitchen. Defendant then moved DS back to the closet and assaulted her again. Defendant held a gun throughout the assaults.

After defendant assaulted DS in the closet, he left the house and BS called the police. LS and DS were unable to identify the man who assaulted them. The roommate described the man who hit him as a black male, but was also unable to identify defendant as his assailant. At trial, BS identified defendant as the man who assaulted her, LS, and DS. She testified that she had never seen him before the night of the incident and had not seen him since that night.

Dr. Vincent Palusci examined LS and DS approximately six hours after the assaults. Dr. Palusci testified that his findings "were indicative of sexual conduct of direct trauma to the genitals, and in the case of [LS], also her anus, which were not explainable in any other manner than the histories provided" by the girls. Christine Dunnick, a forensic nurse, examined BS after the

assaults and found a "half a centimeter perianal tear, which is near the anal opening," consistent with the history provided by BS. Dr. Palusci and Nurse Dunnick collected evidence, including vaginal and rectal swabs, during the examinations and placed the evidence in rape kits. The kits were then sealed and released to the appropriate law enforcement agencies.

The trial court designated Rodney Wolfarth as an expert in the area of DNA analysis. Wolfarth conducted DNA testing on the swabs in the rape kits and the nightgown worn by LS during the assaults, as well as a fitted sheet, a pillowcase, and cigarette butts found at the scene. Wolfarth testified that he found sperm cells in the vaginal and rectal swabs taken from LS. When he tested the sperm cells from the rectal swab, "it was consistent with a mixture and the mixture was consistent with [LS] and an unknown semen donor, designated as Donor 1." Wolfarth found the same mixture on the nightgown and found DNA from Donor 1 on the fitted sheet, pillowcase, and cigarette butts. Wolfarth was unable to identify a match for the DNA at that time, but stated that once DNA testing is completed, the "probative DNA result is entered into what is a DNA data bank called CODIS, which stands for Combined DNA Indexing System." The data are stored to allow for comparisons to convicted felons' profiles at a later date. When a match is made between a DNA sample and a known profile, it is referred to as a CODIS hit.

At defendant's trial in this case, one of the prosecution's witnesses, LB, testified that defendant had sexually assaulted her in 2004, when she was 13 years old. LB told her sister that defendant had assaulted her and, shortly thereafter, the incident was reported to the police. DNA analysts subsequently determined that defendant's DNA matched sperm cells

from LB's vaginal swab and underwear. The results of the DNA testing were entered into CODIS.

On February 1, 2005, a CODIS hit occurred when the system matched defendant's DNA to the DNA samples taken in this case. Thereafter, a search warrant to conduct a buccal swab for defendant's DNA was obtained. Defendant was initially uncooperative, but eventually consented to the swab. Joel Schultze, who was designated by the trial court as an expert in DNA analysis, testified that the DNA sample was tested and compared to Wolfarth's previous findings. According to Schultze, the DNA material on the nightgown, pillowcase, fitted sheet, and cigarette butts were consistent with defendant's DNA. In addition, the DNA mixture in the rectal swab taken from LS was consistent with a mixture of DNA from LS and defendant at 10 of 13 locations. Defendant's DNA was not found on any of the swabs taken from DS, but Schultze explained that even if penetration occurs, "if there's no ejaculation, the male DNA is not going to be there." Schultze further testified: "In the Caucasian population the probability is 1 [in] 1.4 quintillion that [a] randomly chosen person would match the profiles on the cigarettes butts, nightgown, pillowcase and sheet. In the African-American, it's 1 [in] 188.9 quadrillion." As for the rectal swab match, "in the Caucasian population it would be approximately one to two million–one in one to two million people would be able to contribute to that mixture on the rectal swab. In the African-American, it would be one in approximately 100,000 to 175,000 African-Americans."

Defendant was convicted and sentenced as previously stated. He now appeals as of right.

II

Defendant argues that the trial court erred when it permitted Dr. Palusci and Wolfarth to testify by way of

two-way, interactive video technology. At trial, before the first witness testified by videoconferencing, defense counsel stated: "[M]y client has—wanted to question the veracity of these proceedings." On appeal, defendant argues that the testimony violated his constitutional right to confront the witnesses against him and was not properly admitted under any state statute or court rule. Because defendant failed to specifically object to the use of the video technology on these grounds at trial, this issue is unpreserved. See *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004).

A

We review unpreserved claims of nonstructural, constitutional error for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); see also *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (stating that a violation of the Confrontation Clause was not a structural error).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Carines*, *supra* at 763 (citations omitted).]

Therefore, the error will only warrant reversal if the "plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks and citation omitted).

The Sixth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides, in pertinent part, that "[i]n all

criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” US Const, Am VI; *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). The United States Supreme Court has recognized that a primary objective of the Confrontation Clause is to compel witnesses to “stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” *Mattox v United States*, 156 US 237, 242-243; 15 S Ct 337; 39 L Ed 409 (1895). The right of confrontation “is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” *Barber v Page*, 390 US 719, 721; 88 S Ct 1318; 20 L Ed 2d 255 (1968) (quotation marks and citation omitted). The required elements of the Confrontation Clause are: (1) physical presence, (2) an oath, (3) cross-examination, and (4) “observation of demeanor by the trier of fact . . . .” *Maryland v Craig*, 497 US 836, 846; 110 S Ct 3157; 111 L Ed 2d 666 (1990); see also *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001). The combined effect of these elements ensures “that evidence admitted against an accused is reliable and subject to . . . rigorous adversarial testing . . . .” *Craig*, *supra* at 846.

The United States Supreme Court and this Court have also recognized, however, that the right of the accused to meet witnesses face-to-face is not absolute and the Confrontation Clause simply “ ‘reflects a *preference* for face-to-face confrontation at trial.’ ” *Id.* at 849 (emphasis in original; citation omitted); *Pesquera*, *supra* at 309. This preference “ ‘must occasionally give way to considerations of public policy and the necessities of the case.’ ” *Craig*, *supra* at 849, quoting *Mattox*, *supra* at 243; see also *Pesquera*, *supra* at 309-310. In *Craig*, *supra* at 840, 851-852, the United States Supreme

Court held that allowing the testimony of a child witness, who was alleged to be a victim of abuse, by way of one-way, closed circuit television did not violate the defendant's right of confrontation because the procedure adequately protected the other elements of the Confrontation Clause: the oath, the cross-examination, and the ability of the trier of fact to view the demeanor of the witness. The Court made clear, however, that this procedure may only be used if the prosecution shows it is "necessary to further an important state interest . . . ." *Id*. at 852. Therefore, if the prosecution wishes to have a child testify in such a manner, the trial court must hear evidence and make a case-specific finding that the procedure is necessary. *Id*. at 855. The Court held that "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure . . . ." *Id*.

Like the United States Supreme Court, this Court recognized that presenting testimony over closed-circuit television did not violate the defendant's right of confrontation in two special circumstances. *Pesquera*, *supra* at 309; *Burton*, *supra* at 290-291. In *Pesquera*, *supra* at 312-314, this Court concluded that the taking of young sexual abuse victims' testimony by way of one-way, closed-circuit television did not violate the defendant's right of confrontation, noting that the trial court made specific findings that the children would be traumatized if they had to testify in front of the defendant and that the other elements of the Confrontation Clause remained intact. Similarly, in *Burton*, *supra* at 284, the trial court allowed a mentally impaired, adult victim of sexual abuse to testify by way of one-way, closed-circuit television after determining that this method was necessary to prevent causing the witness severe mental and emotional distress. This

Court recognized that for this special procedure to be used, the prosecution must "establish that the use of the procedure is necessary to further an important state interest" such as protecting the physical and psychological well being of a testifying victim. *Id.* at 288. The trial court must hear evidence and determine if the procedure is necessary. *Id*. at 290. The *Burton* Court found that there was an important state interest at stake and that all other aspects of the Confrontation Clause remained intact. *Id*. at 289-290. Therefore, the defendant's right of confrontation was not violated. *Id*. at 291. The Court cautioned, however: "In reaching this conclusion, we stress that our holding is not to be taken by the bench and bar as a blanket approval of the application of such methods in every case. Rather, excepting those cases that fall within the ambit of [statutory provisions for children or developmentally disabled victims], . . . the remedy afforded here should be applied only in the most extreme cases." *Id*.

Craig, *Pesquera*, and *Burton* addressed permissible exceptions to a defendant's right to face-to-face confrontation with regard to the taking of testimony from the alleged victims of a crime by way of one-way, closed circuit televisions. The present case involves the testimony of nonvictim witnesses by way of two-way, interactive video technology. Whether this use of such technology violates a defendant's confrontation rights is a question of first impression in Michigan.

The prosecution suggests that the videoconferencing procedure used in this case may be sufficiently equivalent to physical, face-to-face confrontation. We decline to so conclude. Perhaps, at some point in the future with further advances in technology, conducting trials by way of videoconferencing will be the norm, but we cannot now conclude that the "vital fabric of physical

presence in the trial process" can be "replaced at any time by an image on a screen," to the extent that "virtual presence is the equivalent of physical presence for . . . purposes of the Confrontation Clause." *Harrell v State*, 709 So 2d 1364, 1368-1369 (Fla, 1998).

The United States Courts of Appeals for the Second, Fifth, Sixth, and Eleventh circuits have all addressed the issue before this Court. *Horn v Quarterman*, 508 F3d 306 (CA 5, 2007); *United States v Benson*, 79 Fed Appx 813 (CA 6, 2003); *United States v Yates*, 438 F3d 1307 (CA 11, 2006); *Harrell v Butterworth*, 251 F3d 926 (CA 11, 2001); *United States v Gigante*, 166 F3d 75 (CA 2, 1999). The Fifth and Eleventh circuits held that the requirements articulated in *Craig*, that the court make a specific finding of necessity and that the other three elements of confrontation remain intact, apply to testimony by way of two-way, closed circuit television as well as one-way, closed circuit television. *Quarterman*, *supra* at 317-318 & n 17; *Yates*, *supra* at 1313; *Butterworth*, *supra* at 930.

In *Quarterman*, *supra* at 317, the Fifth Circuit held that the trial court did not infringe the defendant's right of confrontation when it allowed a critically ill witness to testify by two-way, closed-circuit television. The trial court made a case-specific determination of necessity at an evidentiary hearing, as well as a determination that the oath, cross-examination, and demeanor elements of the Confrontation Clause were all intact. *Id*. at 318. The Fifth Circuit concluded that "given the trial court's efforts to confirm [the witness's] illness and inability to travel and the care with which the other aspects of [the defendant's] confrontation rights were preserved, we cannot say that the decision to permit [the witness] to testify via two-way closed-circuit television constituted an unreasonable applica-

tion of established federal law." *Id*. at 317. In addition, the Fifth Circuit observed that "it is possible to view *Craig* as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness's inability to testify invokes the state's interest in protecting the witness . . . ." *Id*. at 320.

Similarly, the Eleventh Circuit held in *Yates*, *supra* at 1315, that in order to allow videoconferenced testimony, "[t]he [trial] court generally must: (1) hold an evidentiary hearing and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured." The Eleventh Circuit noted that "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights, to confront their accusers face-to-face." *Id*. at 1316. In conclusion, the Eleventh Circuit observed:

> Should [the defendants] have wished to waive their rights to confrontation, they were able to do so. In the absence of such a waiver or case-specific findings of exceptional circumstances creating the type of necessity *Craig* contemplates, however, witnesses and criminal defendants should meet face-to-face. The Sixth Amendment so requires. [*Id*. at 1318.]

In contrast to the other circuits' decisions, the Second Circuit held in *Gigante*, *supra* at 81, that when a trial court used a two-way system, face-to-face confrontation was preserved and it was therefore unnecessary to enforce the requirements of *Craig*. However, while the Second Circuit did not apply the *Craig* standard, it noted that the trial court held an evidentiary hearing and made findings that the "crucial" witness was too ill to travel because he was suffering the final stages of

cancer and was under medical supervision. *Id.* at 79-80. Because of this illness, the trial court allowed the witness to testify by two-way, closed-circuit television. *Id.* at 80. The Second Circuit also observed that the procedure employed by the trial court preserved all the other "characteristics of in-court testimony . . . ." *Id*. Ultimately, it ruled that the testimony did not violate the defendant's right of confrontation. *Id*. Nevertheless, the Second Circuit warned that "[c]losed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony." *Id*. at 81.

In 2003, the Sixth Circuit held that the reasoning of *Gigante* applied where an ill, elderly woman was permitted to testify by way of videoconferencing. *Benson*, *supra* at 820-821. The Sixth Circuit noted that the testimony had all the characteristics of in-court testimony and recognized that all the other elements of the Confrontation Clause were present. *Id*. Further, the Sixth Circuit concluded that there was sufficient evidence to support the contention that the witness was too ill to travel. *Id.* at 821. Therefore, the defendant was not deprived of his right of confrontation. *Id.*

While the Eighth Circuit has not addressed the particular issue presented in this case, it has considered whether the use of two-way video technology should be treated the same as the one-way system used in *Craig*. *United States v Bordeaux*, 400 F3d 548, 554 (CA 8, 2005). In *Bordeaux*, the Eighth Circuit noted that " '[c]onfrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under *Craig*." *Id*. It continued:

It is true that a two-way closed-circuit television creates an encounter that more closely approximates a face-to-face confrontation than a one-way closed-circuit television does because a witness can view the defendant with a two-way system. But two-way systems share with one-way systems a trait that by itself justifies the application of *Craig*: the "confrontations" they create are virtual, and not real in the sense that a face-to-face confrontation is real.

The virtual "confrontations" offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect. The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie. . . . Given the ubiquity of television, even children are keenly aware that a television image of a person (including a defendant in the case of a two-way system) is not the person[:] something is lost in the translation. Thus, a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom. We are not alone in noting that something may be lost when a two-way closed-circuit television is employed, for even the *Gigante* court admitted that there may be "intangible elements" of confrontation that are "reduced or eliminated by remote testimony." Admittedly, the "confrontation" offered by a one-way system is, for lack of a better phrase, even more virtual because it depends on the witness envisioning the defendant to create the "confrontation." And one can imagine that this incremental step away from face-to-face confrontations results in a further diluted truth-inducing effect. That said, the touchstone for deciding whether a "confrontation" satisfies the Constitution is whether it is likely to lead a witness to tell the truth to the same degree that a face-to-face confrontation does, and in this respect two-way systems are like one-way systems: they both fall short.

Gigante does not persuade us that "confrontation" through a two-way [closed-circuit] television is constitutionally equivalent to a face-to-face confrontation because it neglects the intangible but crucial differences between a face-to-face confrontation and a "confrontation" that is

> electronically created by cameras, cables, and monitors. We thus join the Eleventh Circuit in rejecting *Gigante's* view of the "confrontation" that two-way closed-circuit television systems afford. [*Id*. at 554-555 (citations omitted).]

Like the majority of federal courts that have examined this issue, we adopt the *Craig* test to determine whether a trial court infringes a defendant's right of confrontation when it allows witness testimony to be taken through two-way, interactive video technology. The trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all the other elements of the Confrontation Clause. *Craig*, *supra* at 851-852, 855; *Quarterman*, *supra* at 318; *Yates*, *supra* at 1315; *Butterworth*, *supra* at 930-931. Our conclusion comports with this Court's approach in *Pesquera* and *Burton*.

Although the record indicates that the remaining three elements of the Confrontation Clause were present when Dr. Palusci and Wolfarth testified, the first prong of the *Craig* test (i.e., a specific finding that the procedure is necessary to further an important public policy or state interest) remains unsatisfied. The record is silent regarding the reason the trial court allowed Dr. Palusci and Wolfarth to testify by means of videoconferencing. There was some indication in the record that Wolfarth was ill, but he indicated at trial that "it's difficult to travel sometimes, yes, but it's not necessarily a health issue." Unlike the cases previously discussed, the record does not indicate that the trial court heard any evidence regarding the necessity of this procedure, nor did the trial court state what important public policy or state interest was being furthered. Given the absence of record evidence or any findings by

the trial court regarding the necessity of the videoconferencing procedure implemented in this case, we cannot determine whether defendant's constitutional right of confrontation was violated. Accordingly, we must remand for the trial court to hear evidence and make case-specific findings regarding whether the procedure was necessary to further a public policy or state interest important enough to outweigh defendant's confrontation rights.

B

The prosecution asserts that it was proper for the trial court to take Dr. Palusci's and Wolfarth's testimony by two-way, interactive video technology pursuant to MCR 6.006(C)(2). We disagree.

"Interpretation of a court rule is a question of law that this Court reviews de novo." *Wilcoxon v Wayne Co Neighborhood Legal Services*, 252 Mich App 549, 553; 652 NW2d 851 (2002). To interpret a court rule, "we apply the same rules as when we engage in statutory interpretation." *Id*. The overarching goal of rule interpretation "is to give effect to the intent of the authors." *Id*. To begin interpreting a court rule, the first step is to consider the language of the rule. *Id*. "If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed." *Id*. Nevertheless, "when reasonable minds can differ on the meaning of the language of the rule, then judicial construction is appropriate." *Id*. When necessary, we "will look to the dictionary definition of that term." *Burton*, *supra* at 286.

MCR 6.006(C) provides, in relevant part:

> As long as the defendant is either present in the courtroom or has waived the right to be present, *upon a showing of good cause*, district and circuit courts may use

> two-way interactive video technology to take testimony from a person at another location in the following proceedings:
>
> * * *
>
> (2) *with the consent of the parties*, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting. [Emphasis added.]

Pursuant to the plain language of MCR 6.006(C)(2), a trial court may take witness testimony by two-way, interactive video technology if: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent. Considering that the record in this case is silent with regard to the reason for the videoconferencing procedure implemented in this case, we cannot conclude that there was a showing of good cause. Nor can we conclude that defendant consented to the procedure. The prosecution argues that by failing to specifically object to the procedure, defendant consented. We cannot agree, however, that a party's silence or failure to specifically object to the taking of testimony by two-way, interactive video technology is the equivalent of consent. The court rule does not define the term "consent." It is defined by Black's Law Dictionary (8th ed) as "[a]greement, approval, or permission as to some act or purpose, [especially] given voluntarily by a competent person; legally effective assent." In this case, before the first witness testified by videoconferencing, defense counsel stated: "[M]y client has—wanted to question the veracity of these proceedings." Defense counsel's statement does not qualify as agreement, approval, or permission; in fact, it indicates that defendant objected to the videoconferencing procedure.

Additionally, in *People v Lawson*, 124 Mich App 371, 376; 335 NW2d 43 (1983), this Court noted that integral elements of the Confrontation Clause, including seeing the witness's demeanor, "must be personally waived by the defendant." Because this Court will not "presume that the defendant waived his constitutional right on the basis of a silent or sketchy record," we find that defendant did not waive his constitutional right to confront the two witnesses. *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975).

On remand, the trial court must hear evidence and determine whether permitting Dr. Palusci and Wolfarth to testify by two-way, interactive video technology was necessary to further an important public policy or state interest. Because resolution of this issue in defendant's favor may obviate the need to address the other issues that defendant raises in this appeal, it is premature to resolve them at this time. We will therefore defer our analysis until after the remand.

Remanded for further proceedings consistent with this opinion and this Court's accompanying order. We retain jurisdiction.

Order Entered August 25, 2009:

PEOPLE V BUIE, Docket No. 278732. Pursuant to the opinion issued concurrently with this order, this case is remanded for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 35 days of the clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court must hear evidence and determine whether permitting Dr. Vincent Palusci and Rodney Wolfarth to testify via two-way interactive video

technology was necessary to further an important public policy or state interest. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

PEOPLE v COOK

Docket No. 280600. Submitted January 13, 2009, at Lansing. Decided August 27, 2009, at 9:00 a.m.

Robert M. Cook was convicted following a bench trial in the Menominee Circuit Court, Richard J. Celello, J., of two counts of delivery of a controlled substance and one count of possession of contraband by a prisoner. The defendant appealed, alleging that he did not waive his right to a jury trial and was, therefore, deprived of that right.

The Court of Appeals *held*:

1. The record shows that the trial court did not inform the defendant of his constitutional right to a jury trial. In addition, the defendant did not sign a written waiver statement, his attorney did, and the defendant, when told that there was a written waiver, objected and stated that he did not sign a waiver. The defendant's trial counsel's statement that the defendant agreed to waive his jury trial right and the written waiver signed only by counsel did not constitute a valid waiver. The defendant did not validly waive his right to a jury trial. The trial court was without authority to proceed with a bench trial.

2. A constitutionally invalid waiver of the right to a jury trial is a structural error that requires automatic reversal. The defendant's convictions must be reversed, and the case must be remanded for a new jury trial or a bench trial after a valid waiver of a jury trial.

Reversed and remanded.

CRIMINAL LAW — CONSTITUTIONAL LAW — RIGHT TO JURY TRIAL — INVALID WAIVER OF RIGHT TO JURY TRIAL — STRUCTURAL ERRORS.

A constitutionally invalid waiver of a criminal defendant's constitutional right to a jury trial is a structural error that requires automatic reversal (US Const, Am VI; Const 1963, art 1, § 20).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Daniel E. Hass*, Prosecuting Attorney, and *William E. Molner*, Assistant Attorney General, for the people.

State Appellate Defender (by *Gail Rodwan*) for the defendant.

Before: OWENS, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM. Defendant was convicted, following a bench trial, of delivery of a controlled substance (diazepam), MCL 333.7401(2)(c), delivery of a controlled substance (morphine), MCL 333.7401(2)(a)(*iv*), and possession of contraband by a prisoner, MCL 800.281(4). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 3 to 8 years, 4 years and 6 months to 40 years, and 2 to 10 years for those respective convictions. On appeal, defendant argues that the trial court deprived him of his right to a jury trial. We agree, and we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

Defendant was an inmate at the Menominee County Jail who was serving his jail sentence on the weekends. Another inmate informed officers that defendant was dispensing controlled substances or pills inside the jail. During defendant's next stay at the jail he allegedly exchanged with the other inmate, who was working with the officers, two pills for a bag of candy. A search of defendant's cell produced additional pills. Defendant has a prescription for both morphine and diazepam and claims he accidentally brought them into the jail.

Before opening statements at his trial, the court stated that defendant had pleaded not guilty to the charges and had agreed to waive his right to a jury trial. The court further stated that the waiver was in writing and contained in each case file. After the court mentioned the jury trial waiver, defendant stated, "Your Honor, I did not sign this waiver." When asked to clarify,

defendant stated, "I did not sign the waiver of trial." Defendant's counsel, who was the person who signed the waiver, then addressed the court stating that an agreement between him and defendant to waive the jury trial and have a bench trial was made during one of the pretrial conferences. After defense counsel made that statement, defendant stated "no." There is also no transcribed record of a pretrial conference where such an agreement was made. The court accepted defense counsel's version of the facts and proceeded with the bench trial. At the conclusion of the bench trial, defendant was convicted of all three charges against him.

II. RIGHT TO A JURY TRIAL

A. JURY WAIVER

The adequacy of a jury trial waiver is a mixed question of fact and law. *United States v Carmenate*, 544 F3d 105, 107 (CA 2, 2008). A criminal defendant has a constitutionally guaranteed right to a jury determination that he is guilty beyond a reasonable doubt. US Const, Am VI; Const 1963, art 1, § 20; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). However, with the consent of the prosecutor and the approval of the trial court, a defendant may waive his right to a jury trial. MCL 763.3; MCR 6.401; *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). In order for a jury trial waiver to be valid, however, it must be both knowingly and voluntarily made. MCR 6.402(B); *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998).

By complying with the requirements of MCR 6.402(B), a trial court ensures that a defendant's waiver is knowing and voluntary. See *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003) (noting that compli-

ance with these procedures creates a presumption that the waiver was knowing, voluntary, and intelligent). In the present case, the trial court did not comply with the requirements of MCR 6.402(B). However, the prosecution argues that the failure to follow the procedure set out in MCR 6.402(B) does not merit automatic reversal, as long as defendant's waiver was knowingly, voluntarily, and intelligently made. *Mosly*, *supra*.

In this case, defendant did not sign a written waiver statement, his attorney did. In addition, at no point did the trial court inform defendant of his constitutional right to a jury trial. Further, after the court stated that defendant had waived his right to a jury trial, defendant objected and asserted that he had not waived his jury trial right. The prosecution argues that defendant informed his trial counsel that he wanted a nonjury trial and authorized his trial counsel to waive his right to a jury trial. A defendant has no right to withdraw a waiver of jury trial once it is validly made, but here there is no record of such a waiver having been made by defendant.

In addition, an attorney cannot waive the right to a jury trial "without the fully informed and publicly acknowledged consent of the client . . . ." *Taylor v Illinois*, 484 US 400, 418 & n 24; 108 S Ct 646; 98 L Ed 2d 798 (1988); see also *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004) (noting that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate"); *People v Newson*, 173 Mich App 160, 165; 433 NW2d 386 (1988) (noting that a defendant's trial counsel may not waive the defendant's right to a jury trial); but see *Gonzalez v United States*, 553 US ___, ___; 128 S Ct 1765, 1774; 170 L Ed 2d 616, 630 (2008) (Scalia, J., concurring in the

judgment) (arguing that the Supreme Court has not directly held that there are fundamental rights that a defendant's attorney may not waive on the defendant's behalf and stating that he would adopt the rule that "all waivable rights . . . can be waived by counsel"). Therefore, defendant's trial counsel's statement that defendant agreed to waive his jury trial and the written waiver signed only by counsel do not constitute a valid waiver. Without any evidence on the record that defendant was fully informed about his right to a jury trial and voluntarily waived that right, we must conclude that defendant did not validly waive his right to a jury trial. Therefore, the trial court was without authority to proceed with a bench trial.

B. THE NATURE OF THE ERROR

Our conclusion that the trial court erred when it proceeded with a bench trial leads us to our next determination, which is whether the error is susceptible to harmless error analysis. The deprivation of the right to a jury trial is a constitutional error. *Bearss*, *supra*. Therefore, we must now decide whether the error is structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). Structural errors are subject to automatic reversal because they are intrinsically harmful. *Duncan*, *supra*. However, nonstructural constitutional errors are subject to harmless error analysis. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Relying on *Mosly*, the prosecution argues that the error was nonstructural and subject to harmless error analysis because a jury waiver that is invalid under the court rules does not necessarily affect the substantial rights of a defendant. However, this Court in *Mosly* did not hold that an invalid jury waiver was not subject to automatic reversal. What this Court determined was that the trial court's failure to follow the mandated procedural requirements of MCR 6.402(B) could be harmless if "the record establishes that [the] defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right." *Mosly*, *supra* at 96. Thus, this Court in *Mosly* concluded that the defendant had to demonstrate that his waiver did not meet the constitutional requirements in order to obtain relief from judgment under MCR 6.508(D). *Mosly*, *supra* at 97. The present case involves more than the mere failure to follow procedural requirements. In this case, defendant argues that in addition to failing to follow Michigan's procedural requirements, the trial court also failed to meet the minimum constitutional requirements for a jury waiver. Therefore, *Mosly* is not applicable to the error at issue here. Instead, we conclude that the decision in *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993), is more applicable to the facts of this case.

In *Sullivan*, the trial court's failure to properly instruct the jury on reasonable doubt resulted in the United States Supreme Court's determining that the defendant was denied the right to a jury trial. *Id.* at 278. After the Court made this determination, the next step was to examine whether the error was amenable to harmless error analysis under the holding in *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). *Sullivan*, *supra* at 278-279. It concluded that it was not:

> Chapman itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which "the jury *actually* rested its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.
>
> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. [*Id.* at 279-280 (citations omitted; emphasis in original).]

In the case at bar, defendant was denied his Sixth Amendment right to a jury trial because the trial court

failed to obtain a valid jury waiver. If we were to conclude that this error was harmless, we would have to speculate about whether a hypothetical jury would also have found defendant guilty. Even if we were persuaded that a hypothetical jury would likely—or even certainly—find defendant guilty beyond a reasonable doubt, the "Sixth Amendment requires more than appellate speculation about a hypothetical jury's action . . . ." *Id*. at 280. Therefore, we conclude that a constitutionally invalid jury waiver is a structural error that requires reversal.

Defendant's convictions are reversed and the matter is remanded for a new jury trial or a bench trial after a valid jury waiver. We do not retain jurisdiction.

PEOPLE v HYDE

Docket No. 282782. Submitted May 14, 2009, at Petoskey. Decided September 1, 2009, at 9:00 a.m.

George W. Hyde was charged in the Cheboygan Circuit Court with operating a motor vehicle while intoxicated (OWI), third offense, operating a motor vehicle with a suspended license, and possessing an open alcohol container in a motor vehicle. The defendant moved to suppress all evidence that resulted from his traffic stop, arguing that the police officers had violated his Fourth Amendment right to be free from unreasonable searches and seizures. He also moved to suppress the evidence obtained from a blood sample drawn after his arrest. The defendant argued that his consent to drawing the sample was obtained through coercion because the officer incorrectly told him that his license would be suspended under the implied consent statute, MCL 257.625c, if he refused the test even though he had diabetes. The court, Scott L. Pavlich, J., denied the motions. After a jury convicted the defendant, he appealed.

The Court of Appeals *held*:

1. The trial court did not err by denying the defendant's motion to suppress evidence obtained after the traffic stop. For a traffic stop to be valid, the police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of the law. The reasonableness of a search or seizure depends on whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. The evidence of erratic driving, which included tire tracks showing that the defendant's vehicle had swerved across the road several times, gave rise to a reasonable suspicion of the defendant's intoxication.

2. Under MCL 257.625c(2), a diabetic is not considered to have given implied consent to having a blood sample drawn. Thus, the officer, who knew that the defendant was a diabetic, improperly informed the defendant of his rights under the implied consent statute.

3. The trial court erred by reasoning that despite the officer's incorrect advice to the defendant concerning his rights, the blood

alcohol evidence was admissible because the police had probable cause and could have obtained a warrant to draw the defendant's blood and thus the evidence would inevitably have been discovered. The inevitable discovery doctrine does not apply when no warrant was obtained and no other warrant exception could have applied but there was probable cause for a warrant. Allowing a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. This approach would diminish the protections of the Fourth Amendment and be an incentive for improper or careless police procedure.

4. The trial court also erred by concluding that had the police officers properly understood the implied consent statute, they would inevitably have discovered evidence of the defendant's blood alcohol level through a breath or urine test. The inevitable discovery doctrine, however, did not apply because there was insufficient evidence showing whether the defendant would have consented or refused to submit to one of those tests. The defendant's consent to drawing a blood sample in the face of a threatened suspension of his license cannot be extrapolated as consent to the other tests and is not enough to demonstrate inevitability by a preponderance of the evidence.

5. The error was not harmless. The jury verdict form indicated that the jury convicted the defendant of OWI under the theory that he had operated the motor vehicle "with a bodily alcohol content of 0.08% or more." The blood alcohol evidence clearly contributed to the defendant's conviction, and it is not clear beyond a reasonable doubt that a rational jury would have found the defendant guilty of OWI absent the error in admitting that evidence. It would be inconsistent with substantial justice and result in a miscarriage of justice to allow the defendant's conviction of OWI to stand under a theory different than the one that the jury specifically determined.

Reversed and remanded for entry of an order vacating the OWI conviction.

SEARCHES AND SEIZURES — CONSTITUTIONAL LAW — INEVITABLE DISCOVERY DOCTRINE — PROBABLE CAUSE TO OBTAIN A WARRANT.

The inevitable discovery doctrine does not apply when the police obtained no search warrant and no other warrant exception could have applied but probable cause existed for a warrant.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Joel McGormley*, Assistant Attorney General, for the people.

Gauthier & Goodrich, PC (by *Aaron J. Gauthier*), for the defendant.

Before: WHITBECK, P.J., and DAVIS and GLEICHER, JJ.

PER CURIAM. Defendant, George Hyde, appeals as of right his jury trial convictions of operating a motor vehicle while intoxicated, third offense,[1] operating a motor vehicle while his license was suspended,[2] and possession of an open alcohol container in a motor vehicle.[3] The trial court sentenced Hyde to six months in jail for the conviction of operating a motor vehicle while intoxicated, three months in jail for the conviction of operating a motor vehicle while his license was suspended, three months in jail for the conviction of possessing an open alcohol container in a motor vehicle, and 18 months' probation. We reverse in part and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from a police stop of Hyde while he was driving his motor home on January 15, 2007, in Tuscarora Township, Michigan. Officer Dale Williams of the Tuscarora Township Police Department testified that he was on patrol with his partner, Officer Walter Chamberlain, on January 15, 2007, in a marked police car. While traveling south along I-75, Officer Chamberlain noticed tire tracks that went from the extreme right to the extreme left side of the road, covering both lanes of travel. Officer Williams followed the tracks off I-75 at the Indian River exit and then continued to follow the tracks in order to catch up with the vehicle

[1] MCL 257.625(1) and (9)(c).

[2] MCL 257.904(1).

[3] MCL 257.624a.

that was leaving them to determine why that vehicle was weaving in the roadway. The tracks, which came from a vehicle with dual rear wheels on each side, continued west along M-68 before making a turn to head south and then turning again to continue traveling on westbound M-68. The vehicle's tracks appeared to make a U-turn at a parking lot and then continued west on M-68. Officer Williams did not stop at the parking lot to determine if the vehicle had stopped there.

Officer Williams caught up with Hyde's vehicle, a motor home, on M-68 when he observed it halfway across the center of the roadway. Officer Williams testified that the roadway was snow-covered, so the centerline was not clearly visible, but the vehicle was in the middle of the roadway. Officer Williams testified that he was positive that Hyde's vehicle was the same vehicle that left the weaving tracks because of the dual-rear-wheel configuration, because of the ease of following the tracks in the light snowfall, and because no other tracks had crossed the ones they were following. Officer Williams testified that he observed that the tire tracks weaved across the roadway six or more times. He also testified that he did not include the weaving tire tracks in his police report because he stopped Hyde's vehicle on the basis of his observation that the vehicle was in the center of the roadway. On cross-examination, Officer Williams testified that he did not put any information about the tracks or I-75 in his first report, but filed a supplemental report just before the proceeding at which Hyde challenged the reason for the traffic stop. Officer Williams also acknowledged that it was not an unusual practice for a person to drive straddling the centerline in inclement weather when there is no oncoming traffic.

Using his emergency overhead lights, Officer Williams stopped Hyde's vehicle at 1:55 a.m. and then approached the vehicle. A video recording of the stop began when the camera for the police car was automatically activated at the same time Officer Williams activated his emergency overhead lights. Officer Williams asked the driver, who was later identified as Hyde, to get out of the vehicle because a dog was inside it. At his first contact with Hyde, Officer Williams smelled intoxicants. Hyde appeared to have slow motor skills and poor balance when he got out of the vehicle. Hyde also demonstrated slurred speech and was unable to say the alphabet or count from 17 to 25 and then back down to 23. Hyde told Officer Williams that he probably could not do the counting exercise sober. When Officer Williams asked him if he was not sober, Hyde responded that he was not going to lie to Officer Williams and then attempted and failed to complete the counting exercise. Officer Williams testified that he was aware that a diabetic may sometimes appear intoxicated because of blood sugar problems and that he was aware Hyde was diabetic because Hyde had told him so. However, Officer Chamberlain testified that, in his experience, someone who was suffering from diabetic problems would still be able to say the alphabet and count.

Hyde said that he did not have a driver's license because it was suspended and provided Officer Williams with a tribal card for identification. Hyde also told Officer Williams that he was coming from Marquette, Michigan, and had consumed five or six beers. According to Officer Williams, Hyde first stated that he had been drinking since Marquette, but there was no audio of this on the video recording of the stop. Later during the stop, Hyde said that he had been drinking since he passed through Newberry, Michigan, at 11:00 p.m.; this statement was recorded on the video. Officer Williams

testified that Newberry is 106 miles from Cheboygan and that Marquette is 103 miles from Newberry. Officer Williams did not have Hyde do any field tests involving balance because Hyde indicated that he had a medical condition other than his diabetes that Officer Williams had never heard of and also because Officer Williams did not want Hyde to slip and fall in the snow.

Later during the stop, Officers Williams and Chamberlain entered Hyde's motor home after Hyde said he was cold, and Hyde then produced his registration and proof of insurance. While inside the motor home, Officer Williams observed a brown paper bag directly to the right of the driver's seat with a six-pack of Coors beer inside it. There were four empty bottles, while the fifth bottle was three-quarters empty and the sixth was unopened. There were also beer cans in the sink that Hyde claimed were his daughter's from a previous night. Officers Williams and Chamberlain, who had both made more than 100 drunk-driving arrests in their careers, believed that Hyde was under the influence of alcohol.

The police arrested Hyde, and before leaving the scene, Officer Williams asked Hyde if he needed his insulin, but Hyde stated that he had already taken some. Hyde was advised of his rights and asked to complete a sobriety test at the Cheboygan County Jail, which was videotaped. A sample of Hyde's blood was taken at 3:30 a.m. The parties stipulated that the proper procedures were used in withdrawing Hyde's blood. There were no fingerprints taken from the beer bottles, and Hyde's blood sugar levels were not checked. The blood test revealed that Hyde's blood alcohol content was 0.13 grams per 100 milliliters of blood.

The video recording of the stop and the video recording of what happened at the jail were both admitted into evidence, and both tapes were played for the jury.

Officer Williams also testified that he had received certification from the state of Michigan indicating that Hyde's driving privileges had already been revoked when the stop took place. The parties also stipulated that Hyde's license was revoked and that he was aware of this revocation.

Hyde moved to suppress all evidence that resulted from his stop because it violated his constitutional right to be free from unreasonable searches and seizures. During the hearing, the prosecution argued that because the police officers had observed the swerving tracks and saw Hyde driving over the centerline, the stop was reasonable and that the motion should be denied. Hyde argued that the videotape of the stop showed that no lines were visible on the road because of the snow, and the officer agreed that no lines were visible. On the basis of this, Hyde contended that there were no grounds for the stop and any evidence seized as a result of the stop should be suppressed.

The trial court denied Hyde's motion, finding that Officer Williams was able to observe the tracks because of the freshly fallen snow and the absence of other tire tracks. The trial court reasoned that although the centerline was not visible because of the steady snowfall, with reasonable observation one could estimate the vehicle's position on the roadway. The trial court also reasoned that since they had followed Hyde's vehicle's tracks, it was reasonable for these officers to conclude that Hyde was driving with impaired abilities because the tracks went back and forth across the roadway and because Officer Williams observed Hyde's vehicle cross the center of the road. The trial court concluded that these facts were enough for a reasonable person to believe that Hyde was operating a vehicle while he was under the influence of alcohol.

Hyde also moved to suppress his blood sample and the blood test results, arguing that his Fourth Amendment rights were violated because his consent to the blood drawing was the product of coercion when the police incorrectly told him that the implied consent statute still applied to him even though he had diabetes. The trial court denied Hyde's motion to suppress, concluding that although Hyde had been improperly informed about the consequences of his refusal to take a blood test because he was a diabetic, his bodily alcohol content would have been inevitably discovered had the officer followed the correct procedure. The trial court reasoned that the officer had the option to request that Hyde take either a breath or urine test. The trial court stated that it was unaware of any advantage a blood test gave over these other tests. The trial court also concluded that it was not apparent from the record that Hyde would have refused a breath test or a urine test because he consented to the blood test and that if he had refused, the officer could have obtained a warrant for a blood test because the officer had sufficient probable cause. The trial court relied on *People v Brzezinski*[4] for the proposition that suppression would not be appropriate when there was probable cause to secure a warrant because the evidence would have been obtained regardless.

II. SUPPRESSION OF THE TRAFFIC STOP EVIDENCE

A. STANDARD OF REVIEW

Hyde argues that his convictions should be vacated on the ground that the trial court erred by denying his motion to suppress evidence seized after his vehicle was stopped because the police did not have reasonable

[4] *People v Brzezinski*, 243 Mich App 431; 622 NW2d 528 (2000).

suspicion to justify the stop. Hyde contends that Officer Williams's testimony established that Hyde's crossing of the centerline was not an unusual driving tactic in inclement weather and that simply crossing the centerline one time in snowy conditions does not constitute reasonable suspicion. Moreover, Hyde argues that although there was testimony about tracks on I-75 crossing from one lane to the other, Officer Williams testified that these tracks did not form the basis of his stop, and he admitted that there were other tracks on I-75 at the time. We review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress.[5] We review de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies.[6]

B. LEGAL STANDARDS

The benchmark for satisfaction of Fourth Amendment rights is reasonableness, and reasonableness requires a fact-specific inquiry that is measured by examining the totality of the circumstances.[7] "In order to effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law."[8]

C. APPLYING THE STANDARDS

Given Officer Williams's testimony, he and his partner had a reasonable suspicion that criminal activity

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[5] *People v Dunbar*, 264 Mich App 240, 243; 690 NW2d 476 (2004).

[6] *People v Fletcher*, 260 Mich App 531, 546; 679 NW2d 127 (2004).

[7] *People v John Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005).

[8] See *People v Matthew Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999).

was taking place when they decided to stop Hyde to investigate whether he was intoxicated while driving his motor home. The police observed a set of dual-wheeled tracks in the freshly fallen snow that swerved across two lanes of the road. Following these tracks, which were not obscured by other tracks on the road, they observed at least six instances where the tracks swerved across the road. When Officers Williams and Chamberlain caught up with Hyde's vehicle, which was a dual-wheeled motor home, they observed it traveling in the middle of the road. According to Officer Williams, they had followed the same set of tracks the entire time.

"[T]he reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' "[9] Moreover, erratic driving, such as swerving within a lane and driving on the lane markers, can give rise to a reasonable suspicion of intoxication justifying an investigatory stop.[10]

The police officers observed swerving tracks of a dual-wheeled vehicle and followed those tracks until catching up with Hyde's dual-wheeled vehicle. The numerous swerves from one side of the roadway, the clear tracks left by the same vehicle, and Hyde's driving in the center of the road when the officers caught up to him together suggest that he was driving erratically, which justified the officers' stopping him to investigate whether he was intoxicated. Therefore, we conclude that the trial court did not err by denying Hyde's motion to suppress evidence obtained after the traffic stop.

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[9] *John Williams*, *supra* at 314, quoting *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[10] *People v Christie* (*On Remand*), 206 Mich App 304, 309; 520 NW2d 647 (1994).

III. SUPPRESSION OF THE BLOOD SAMPLE

A. STANDARD OF REVIEW

Hyde argues that the trial court erred by failing to suppress his blood sample. He contends that the trial court erred by concluding that the evidence could be admitted under the inevitable discovery doctrine because the police could have obtained a warrant if not for their mistake in advising him of his rights under the informed consent statute. Hyde argues that this doctrine should not apply because it would create an exception that would obviate the need to obtain a warrant in any situation in which there is probable cause. Moreover, Hyde contends that the rationale—that the police would have done a urine or a breath test had they properly understood the informed consent statute—is too speculative for the doctrine to apply and would have produced different pieces of evidence than a blood sample. As stated earlier, we review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress.[11] And we review de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies.[12]

B. LEGAL STANDARDS

"It is well settled that both the United States Constitution[13] and the Michigan Constitution[14] 'guarantee the right of persons to be secure against unreasonable searches and seizures.' "[15] The Michigan Constitution in

[11] *Dunbar*, *supra* at 243.

[12] *Fletcher*, *supra* at 546.

[13] US Const, Am IV.

[14] Const 1963, art 1, § 11.

[15] *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004), quoting *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000).

this regard is generally construed to provide the same protection as the Fourth Amendment of the United States Constitution.[16] "Generally, if evidence is unconstitutionally seized, it must be excluded from trial."[17] "Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right to privacy, and preserves judicial integrity."[18]

C. THE INEVITABLE DISCOVERY EXCEPTION

In *Nix v Williams*,[19] the United States Supreme Court adopted the ultimate or inevitable discovery exception to the exclusionary rule. The Court held that when information is discovered after the police violate the Fourth Amendment, the evidence should not be suppressed "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . ."[20] The rationale for this inevitable discovery exception is that

> the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred.[21]

The inevitable discovery doctrine, as applied by Michigan caselaw, permits the admission of evidence obtained in violation of the Fourth Amendment if it can

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[16] *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999).

[17] *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008).

[18] *Id*.

[19] *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

[20] *Id*. at 444.

[21] *Id*. at 443.

be shown by a preponderance of the evidence that the items found would have ultimately been obtained in a constitutionally accepted manner.[22] Three concerns arise in the inevitable discovery analysis: (1) whether the legal means are truly independent, (2) whether both the use of the legal means and the discovery by that means are truly inevitable, (3) and whether the application of the inevitable discovery doctrine provides an incentive for police misconduct or significantly weakens Fourth Amendment protections.[23]

D. THE IMPLIED CONSENT STATUTE

In this case, it is undisputed that Officer Williams improperly informed Hyde of his rights under Michigan's implied consent statute. The statute provides:

> (1) A person who operates a vehicle upon a public highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or both in his or her blood or urine or the amount of alcohol in his or her breath in all of the following circumstances:
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> (a) If the person is arrested for a violation of [MCL 257.625(1)], (3), (4), (5), (6), (7), or (8), [MCL 257.625a(5)], or [MCL 257.625m] or a local ordinance substantially corresponding to [MCL 257.625(1)], (3), (6), or (8), [MCL 257.625a(5)], or [MCL 257.625m].

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[22] *People v Stevens* (*After Remand*), 460 Mich 626, 637; 597 NW2d 53 (1999); *People v Kroll*, 179 Mich App 423, 429; 446 NW2d 317 (1989).

[23] *Stevens*, *supra* at 638.

> (2) A person who is afflicted with hemophilia, diabetes, or a condition requiring the use of an anticoagulant under the direction of a physician is not considered to have given consent to the withdrawal of blood.[24]

The consequences for refusing to submit to the requested test are described in MCL 257.625a(6)(b)(*v*), which states: "Refusing a peace officer's request to take a test described in [MCL 257.625a(6)(b)(*i*)] will result in the suspension of his or her operator's or chauffeur's license and vehicle group designation or operating privilege and in the addition of 6 points to his or her driver record."

E. APPLYING THE STANDARDS AND THE STATUTE

Hyde is a diabetic, and it is undisputed that Officer Williams was aware of this fact. However, according to the prosecution's offer of proof at the suppression hearing, to which Hyde had no objections, Officer Williams was unaware of the diabetes exception for a blood withdrawal under the implied consent statute. Therefore, Officer Williams erroneously instructed Hyde that if he refused to provide a blood sample, the consequences described in MCL 257.625a(6)(b)(*v*) would apply. On the basis of this incorrect information, Hyde consented to providing a blood sample. The police did not obtain a search warrant or take any steps to do so.

According to the prosecution, however, Officer Williams would have secured a search warrant for Hyde's blood had he known of the exception for diabetics in the implied consent statute because there was sufficient evidence to establish probable cause for a warrant. The prosecution also stated that had Officer

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[24] MCL 257.625c.

Williams been aware of the diabetes exception, he could have demanded that Hyde submit to a breath or urine test under the implied consent statute because the diabetes exception does not apply to those tests. The trial court adopted these rationales by concluding that although Hyde's rights were violated, the evidence would inevitably have been discovered by a breath or urine test without a warrant under the implied consent statute or the police could have obtained a warrant. We will separately analyze these two prongs of the trial court's rationale for admitting the evidence resulting from Hyde's blood test.

1. SUFFICIENT PROBABLE CAUSE TO OBTAIN A WARRANT

With regard to its conclusion that the police could have obtained a warrant, the trial court relied on *People v Brzezinski*,[25] observing that the *Brzezinski* Court "in its analysis in that situation found that the police may very well have had information necessary to secure a warrant and if so, the evidence would have been obtained had the law been complied with and therefore suppression would not be appropriate."

This Court has never held in a binding decision that the inevitable discovery doctrine may apply when no warrant was obtained and no other warrant exception could have applied but there was probable cause for a warrant. *Brzezinski*, while suggesting this may be allowable, did not definitively answer the question. In *Brzezinski*,

> Defendant moved to suppress evidence found by state troopers when they searched him after they found him unconscious in the back seat of a vehicle near the scene of a suspicious fire. Defendant matched the description of a

[25] *Brzezinski*, *supra*.

> man seen leaving the scene of the fire who seemed to be disoriented and injured.[26]

This Court remanded the case for a determination whether the inevitable discovery doctrine should apply.[27] This Court reasoned that if there was probable cause for the issuance of a warrant, the incriminating evidence found in the defendant's pockets would have been discovered anyway, despite the police misconduct.[28] Both parties here agree that this Court was not making a definitive statement of law in *Brzezinski*, but the prosecution argues that the case strongly suggests that the inevitable discovery doctrine should be applied in this context, in which the police had probable cause but did not obtain a warrant. We agree that, as Hyde argues, the dicta from *Brzezinski* should not be construed as an authoritative rule of law. Moreover, there are no decisions relying on *Brzezinski* for this holding. *Brzezinski* only commented that the doctrine might apply in this context, so a more thorough analysis is necessary and federal decisions, although not binding, are helpful in this regard.

The federal circuits have adopted differing views on the application of the inevitable discovery doctrine. Several circuits completely reject applying the inevitable discovery doctrine in a situation in which there was probable cause but a warrant was not obtained before the illegal search. The United States Court of Appeals for the Sixth Circuit stated in *United States v Johnson*[29] that "to hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that

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[26] *Id*. at 432.

[27] *Id*. at 437.

[28] *Id*. at 436-437.

[29] *United States v Johnson*, 22 F3d 674, 683 (CA 6, 1994).

there is inevitable discovery and no warrant requirement whenever there is probable cause." Additionally, the United States Court of Appeals for the Ninth Circuit stated in *United States v Mejia*:[30]

> If evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be *any* reason for officers to seek a warrant. To apply the inevitable discovery doctrine whenever the police could have obtained a warrant but chose not to would in effect eliminate the warrant requirement.

The United States Court of Appeals for the Fourth Circuit also agreed with this position in *United States v Allen*.[31]

However, other circuits have permitted evidence under the inevitable discovery doctrine when, even though the evidence was obtained illegally, a warrant would have been obtained had the police sought one.[32] The courts that allow this application of the doctrine in the warrantless context when no other warrant exceptions could have applied generally require the prosecution to show that (1) the police had a high level of probable cause to obtain a warrant, (2) the police were in the process of obtaining a warrant, and (3) the same evidence would have been obtained pursuant to the eventual warrant.[33]

But even under this more expansive application of the inevitable discovery doctrine, we conclude that the

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[30] *United States v Mejia*, 69 F3d 309, 320 (CA 9, 1995) (emphasis in original).

[31] *United States v Allen*, 159 F3d 832, 842 (CA 4, 1998).

[32] See *United States v Brown*, 328 F3d 352, 357 (CA 7, 2003); *Unites States v Souza*, 223 F3d 1197, 1203-1205 (CA 10, 2000); *United States v Ford*, 22 F3d 374, 377-381 (CA 1, 1994).

[33] *Souza*, *supra* at 1203-1205.

evidence here should have been excluded. Although there was a high level of probable cause to obtain a warrant and the same evidence—Hyde's blood—would have been obtained pursuant to the eventual warrant, it is obvious that the police were not in the process of obtaining a warrant when they secured Hyde's invalid consent. Officer Williams did not understand the implied consent statute exception for diabetics and did not attempt to correct his mistake once Hyde's blood sample was obtained.

Moreover, the line of reasoning that does not permit the doctrine to apply is particularly persuasive when placed in the context of Michigan's three concerns with applying the inevitable discovery doctrine—independent legal means, inevitability of use of the legal means and discovery of the evidence, and incentive for police misconduct or significant weakening of Fourth Amendment protections.[34] Under the facts here, there was an independent legal means to obtain the evidence by securing a search warrant. The discovery of the evidence was also inevitable because it is undisputed that Officer Williams would have secured a warrant had he realized his error. Also, there was easily enough evidence to establish probable cause based on Hyde's erratic driving, admission that he had been drinking, and his failure of two sobriety tests. *However*, the damage that would be done to the Fourth Amendment and the incentive for police misconduct by adopting the inevitable discovery doctrine under these circumstances outweigh these considerations. To allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. Even in the context of a good-faith error, we reject the notion that a post hoc

[34] *Stevens*, *supra* at 638.

probable cause analysis can preclude the constitutional requirement that a neutral and detached magistrate issue the warrant. Such an approach diminishes the Fourth Amendment and is an incentive for improper or careless police practices.

2. ALTERNATIVE BREATH OR URINE TESTS

The trial court's second rationale for allowing the evidence to be admitted was that it would have been obtained through a urine test or a breath test if the police had properly understood the implied consent statute. The trial court found that there was no evidence of whether these tests would yield different results. And the trial court concluded that the statute provided each test as an alternative for obtaining a person's blood alcohol content. However, the inevitable discovery doctrine is inapplicable because there is insufficient evidence to show whether Hyde would have consented or refused to submit to those tests. Although Hyde consented to the blood test because he was told that his refusal would result in suspension of his driving privileges, this consent cannot be extrapolated as consent to the other tests. In other words, the trial court's analysis requires the assumption that because Hyde consented to the blood drawing, when given the same information about the consequences of refusing a breath or urine test, he would still have consented. While the circumstances suggest that this is a possibility because of Hyde's consent to the blood drawing, the logical leap of inferring Hyde's consent to a breath or a urine test is not enough to demonstrate inevitability by a preponderance of the evidence.[35]

[35] See *Nix*, *supra* at 445 n 5 (holding that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment").

In sum, we conclude that because no application of the inevitable discovery doctrine saves the warrantless search, the trial court should have suppressed the evidence of Hyde's blood sample and test results.

F. HARMLESS ERROR

When a defendant shows preserved, constitutional error, "[i]f the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt."[36] "A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' "[37] There must be no "reasonable possibility that the evidence complained of might have contributed to the conviction."[38] Under the circumstances presented here, we conclude that the trial court's failure to suppress the blood sample evidence was not harmless beyond a reasonable doubt.

The amended felony information charged Hyde generally under MCL 257.625(1), operating a motor vehicle while intoxicated (OWI), stating that Hyde "did, operate a vehicle upon a highway, M-68, while under the influence of a controlled substance and/or alcoholic liquor, *or* having an alcohol content of 0.08 grams or more per 100 milliliters of blood[.]"[39] OWI is a hybrid version of two offenses: MCL 257.625(1)(a) prohibits

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[36] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[37] *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States*, 527 US 1, 18; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

[38] *People v Anderson* (*After Remand*), 446 Mich 392, 406; 521 NW2d 538 (1994) (quotation marks and citations omitted).

[39] Emphasis added.

operating a motor vehicle under the influence of intoxicating liquor (OUIL) and MCL 257.625(1)(b) prohibits operating with an unlawful bodily alcohol content (UBAL). Therefore, under MCL 257.625(1), OWI requires proof of three elements: (1) the defendant operated a motor vehicle (2) on a highway or other place open to the general public or generally accessible to motor vehicles (3) while under the influence of liquor or a controlled substance, or a combination of the two, *or* with a blood alcohol content of 0.08 grams or more per 100 milliliters of blood. Notably, the third element is disjunctive; that is, it can be satisfied in *either* of the two ways.

In keeping with the alternative theories of guilt presented to the jury, the jury verdict form provided in pertinent part as follows:

Count I

Operating While Intoxicated

(1) / / Not Guilty

(2) / / Guilty of Operating While Intoxicated (OWI) because of:

(A) / / operating under the influence of:

(i) / / alcohol

(ii) / / a controlled substance

(iii) / / a combination of alcohol and a controlled substance

(B) / / operating with a bodily alcohol content of 0.08% or more

The jury chose option (2)(B), "operating with a bodily alcohol content of 0.08% or more[.]"

It is clear from the jury verdict form that the jury specifically determined that Hyde was guilty of operating a motor vehicle while intoxicated under the theory

that he was operating a vehicle "with a bodily alcohol content of 0.08% or more." Despite the evidence presented in the record that could reasonably support a conviction under the first theory of OWI (the officers' observations, Hyde's own admissions, Hyde's slurred speech and failure of two sobriety tests, and the physical beer bottle evidence), we conclude that it would be inconsistent with substantial justice[40] and result in a miscarriage of justice[41] to allow Hyde's conviction under MCL 257.625(1) to stand under a different theory than the one specifically determined by the jury. The blood alcohol evidence clearly contributed to Hyde's conviction,[42] and it is not clear beyond a reasonable doubt that a rational jury would have found Hyde guilty of OWI absent the error in admission of the blood alcohol evidence.[43]

We reverse in part and remand for entry of an order vacating Hyde's OWI conviction under the theory that he operated a vehicle "with a bodily alcohol content of 0.08% or more[.]" We do not retain jurisdiction.

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[40] MCR 2.613(A).

[41] MCL 769.26.

[42] See *Anderson*, *supra* at 406.

[43] See *Mass*, *supra* at 640 n 29.

PORTER v PORTER

Docket Nos. 284086 and 285095. Submitted August 11, 2009, at Detroit. Decided September 1, 2009, at 9:05 a.m.

The plaintiff, Patricia Porter, also known as Patricia Henkel and Patricia Gravel-Henkel, obtained a divorce from the defendant, Edward W. Porter. The defendant filed a motion in the Wayne Circuit Court, Family Division, for the issuance of an order to show cause why the plaintiff should not be held in contempt for failing to comply with the court's prior order concerning parenting time and telephone contact between the defendant and the parties' minor child. The court, Megan Maher Brennan, J., issued an order to show cause and after a July 27, 2007, hearing, found the plaintiff in contempt, ordered the plaintiff to allow the parenting time, and ordered the plaintiff to pay a $1,000 sanction by August 29, 2007. The court reserved ruling on the plaintiff's request for attorney fees. After the plaintiff failed to pay the sanction or comply with the order regarding parenting time, the defendant again sought an order to show cause why the plaintiff should not be held in contempt. The plaintiff filed an answer, but only appeared by counsel at the hearing on the motion. The court ordered the plaintiff to pay the $1,000 previously ordered sanction and an additional $3,100 for the defendant's attorney fee. The court ordered the parties to continue to attend family reconciliation counseling and warned the plaintiff that she would be sanctioned $2,000 if she failed to cooperate with the counselor. The order also included specific travel plans for the child's visitation with the defendant. The defendant thereafter filed yet another motion for an order to show cause why the plaintiff should not be held in contempt for failing to pay $4,100 in sanctions and attorney fees previously ordered and for not cooperating with the family counselor. Following a show cause hearing, the court found the plaintiff in contempt and on February 13, 2008, ordered her jailed for two days unless she paid $4,100. The court sanctioned the plaintiff an additional $2,000 for her failure to cooperate with the family counselor. The court also entered a separate order concerning the fees and the authority of the family counselor. The plaintiff appealed by right the February 13, 2008, order of con-

tempt (Docket No. 284086) and by leave granted the July 27, 2007, order of contempt (Docket No. 285095). The appeals were consolidated.

The Court of Appeals *held*:

1. The contempt proceedings were for civil contempt, not criminal contempt. The plaintiff had the right to rudimentary due process consisting of notice and an opportunity to present a defense, and the defendant had the burden of proving by a preponderance of the evidence that the order he was seeking to enforce was violated.

2. The defendant's failure to attach a supporting affidavit to his motions for orders to show cause, as required by MCR 3.606(A), did not deprive the trial court of its jurisdiction over the contempt proceedings. The lack of notarization does not warrant the setting aside of the trial court's contempt orders. Even if the contempt proceedings were procedurally defective, the trial court was not deprived of its jurisdiction over the subject matter or the parties. The plaintiff was accorded rudimentary due process and there was sufficient evidence of willful violation of the trial court's orders.

3. The plaintiff's claim of poverty was spurious and without merit. The trial court did not err by summarily rejecting it before finding the plaintiff in contempt for failing to pay the court-ordered sanctions and attorney fees. The trial court did not abuse its discretion by declining to conduct an evidentiary hearing regarding the plaintiff's claimed indigence.

Affirmed.

Bruce T. Leitman for the plaintiff.

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), for the defendant.

Before: CAVANAGH, P.J., and MARKEY and DAVIS, JJ.

MARKEY, J. In Docket No. 284086, plaintiff appeals by right a February 13, 2008, contempt order. In Docket No. 285095, plaintiff appeals by leave granted a July 27, 2007, contempt order.[1] We affirm.

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[1] Each appeal arises from the same lower court divorce proceeding and involves defendant's efforts to enforce the trial court's orders regarding

The parties are divorced and have one minor child who lives with plaintiff in Michigan. The divorce action, originally filed in Massachusetts, was transferred to Michigan in 1995. Defendant continued to reside in Massachusetts, but at the time of these proceedings he had relocated to Exeter, New Hampshire. The child has a history of being contentious regarding visiting his father. The register of actions in this case leading up to the instant contempt proceedings consists of 14 pages and 279 entries. On May 3, 2005, the trial court appointed a parenting time coordinator to resolve parenting time issues between the parties. The parenting time coordinator reported recommendations to the court, and defendant moved the court for the entry of an order adopting them. Instead, the trial court appointed a guardian ad litem and scheduled an evidentiary hearing. The guardian ad litem recommended that defendant have continued parenting time, telephone contact, and that the child receive mental health therapy. The trial court adopted these recommendations in a June 25, 2007, order. Relevant to this appeal, the trial court ordered parenting time for defendant, including two weeks of summer visitation commencing June 30, 2007, and that defendant have at least 10 minutes weekly telephone contact with the child.

On July 17, 2007, defendant moved for the issuance of an order to show cause why plaintiff should not be held in contempt because the ordered summer visitation and telephone contact did not occur. On July 18, 2007, the trial court issued its order to show cause and after a July 27, 2007, hearing, found plaintiff in contempt. The court ordered that defendant be provided

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parenting time. This Court consolidated these appeals to advance the efficient administration of the appellate process. Unpublished order of the Court of Appeals, entered March 27, 2009 (Docket Nos. 284086 and 295095).

rescheduled summer visitation from August 5, 2007, through August 19, 2007. The contempt order also sanctioned plaintiff $1,000 to be paid by August 29, 2007. The court reserved defendant's request for attorney fees. Plaintiff appeals this order in Docket No. 285095.

Plaintiff did not pay the $1,000 sanction. Also, the court-ordered August visitation did not occur, and defendant did not have parenting time for Thanksgiving 2007. On December 12, 2007, defendant filed another motion for an order to show cause why plaintiff should not be held in contempt of court for failing to comply with the trial court's orders. Plaintiff filed an answer to the motion but only appeared by counsel at the December 19, 2007, hearing. The trial court, again, ordered plaintiff to pay both the previously ordered $1,000 sanction and an additional $3,100 for defendant's attorney fees. Further, the court adjourned the show cause hearing to the next day, to be cancelled if plaintiff and the child attended a family counseling session to be scheduled for later in the day on December 19, 2007. In addition, the court ordered the parties to continue to attend family reconciliation counseling and warned that plaintiff would be sanctioned $2,000 if she failed to cooperate with the counselor. The court's December 19, 2007, order also included specific travel plans for the child to visit defendant during his Christmas parenting time.

On January 31, 2008, defendant filed yet another motion for an order to show cause why plaintiff should not be held in contempt for failing to pay the $4,100 in sanctions and attorney fees arising out of the July 27 and December 19, 2007, show cause hearings and for not cooperating with the family counselor by not approving a consent order the counselor required to

clarify her authority and fees. At a February 13, 2008, show cause hearing, the trial court found plaintiff in contempt and ordered plaintiff jailed for two days unless she paid the $4,100.[2] The court also sanctioned plaintiff $2,000 for her failure to cooperate with the family counselor by not signing the consent order. The trial court entered a separate order containing the provisions of the proposed consent order by appointing the family counselor as the parties' child specialist and addressing her fees and authority. In Docket No. 284086, plaintiff appeals the order finding her in contempt.

Plaintiff first argues that the trial court abused its discretion by finding her in contempt because the proceedings were criminal, not civil. Plaintiff contends that she was punished for violating the trial court's June 25, 2007, order, but was not accorded the procedural protection of a criminal contempt proceeding. Moreover, she argues that because an order to show cause was issued without a supporting affidavit as required by MCR 3.606(A), the trial court lacked jurisdiction over the contempt proceeding. We disagree.

We review a trial court's issuance of a contempt order for an abuse of discretion. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). Moreover, a

[2] We note that the record does not support the suggestion of plaintiff's counsel at oral argument that this "sentence" was executed, i.e., that plaintiff went to jail. On March 5, 2008, plaintiff moved the trial court for a stay of proceedings and an appeal bond, and stated that she had paid defendant's attorney $4,100 on February 13, 2008, as ordered by the court. Defendant's attorney responded to this motion by acknowledging that she was paid the $4,100 on February 13, 2008. This response also details that defendant's costs in pursuing enforcement of court-ordered parenting time, apart from his attorney fees, exceeded the total of $3,000 in sanctions ordered by the trial court, and included payments of $3,442.50 for psychological counseling for the child, $1,575 for the guardian ad litem, and $2,758.78 for the family counselor.

trial court's factual findings are reviewed for clear error and questions of law are reviewed de novo. *Id.* The abuse of discretion standard recognizes that there will be circumstances where there is no single correct outcome and which require us to defer to the trial court's judgment; reversal is warranted only when the trial court's decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

First, we reject plaintiff's argument that the contempt proceedings at issue here were criminal. "Criminal contempt differs from civil contempt in that the sanctions are punitive rather than remedial." *DeGeorge*, *supra* at 591. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *In re Contempt of Henry*, 282 Mich App 656, 666; 765 NW2d 44 (2009) (quotation marks and citations omitted). Criminal contempt is intended to punish the contemnor for past conduct that affronts the dignity of the court. *Jaikins v Jaikins*, 12 Mich App 115, 120; 162 NW2d 325 (1968). Thus, when a court exercises its criminal contempt power it is not attempting to force the contemnor to comply with an order, but is simply punishing the contemnor for past misconduct that was an affront to the court's dignity. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 713; 624 NW2d 443 (2000). On the other hand, if the court employs its contempt power to coerce compliance with a present or future obligation or to reimburse the complainant for costs incurred by the contemptuous behavior, including attorney fees, the proceedings are civil. *In re Contempt of Dougherty*, 429 Mich 81, 91-96; 413 NW2d 392 (1987); *In re Contempt of Calcutt*, 184 Mich App 749, 758; 458 NW2d 919 (1990); MCL 600.1721. Thus, there "are two types of civil contempt sanctions, coercive and

compensatory." *Dougherty*, *supra* at 97. Nevertheless, civil sanctions primarily intended to compel the contemnor to comply with the court's order may also have a punitive effect. *Id*. at 93; *DeGeorge*, *supra* at 592. " ' "If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil . . . . The order in such a case is not in the nature of a punishment, but is coercive, to compel him to act in accordance with the order of the court." ' " *Dougherty*, *supra* at 95, quoting *People ex rel Attorney General v Yarowsky*, 236 Mich 169, 171; 210 NW 246 (1926) (citation omitted).

Differentiating between civil contempt and criminal contempt is not easy because both forms of contempt might result in the contemnor's being imprisoned for willfully failing to comply with an order of the court. MCL 600.1701; MCL 600.1715. Thus, all contempt proceedings are referred to as " 'quasi-criminal' " or " 'criminal in nature.' " *Dougherty*, *supra* at 90, citing *Bessette v W B Conkey Co*, 194 US 324, 326; 24 S Ct 665; 48 L Ed 997 (1904), and Moskovitz, *Contempt of injunctions, civil and criminal*, 43 Colum L R 780 (1943). The distinction between civil and criminal contempt is important because "a criminal contempt proceeding requires some, but not all, of the due process safeguards of an ordinary criminal trial." *Dougherty*, *supra* at 91. A party charged with criminal contempt is presumed innocent, enjoys the right against self-incrimination, and the contempt must be proven beyond a reasonable doubt. *DeGeorge*, *supra* at 592; *Jaikins*, *supra* at 120-121. Further, a party accused of criminal contempt must "be informed of the nature of the charge against him or her and . . . be given adequate opportunity to prepare a defense and to secure the assistance of counsel." *DeGeorge*, *supra* at 592. In contrast, in a civil

contempt proceeding, the accused must be accorded rudimentary due process, i.e., notice and an opportunity to present a defense, and the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated. *Bowler v Bowler*, 351 Mich 398, 405; 88 NW2d 505 (1958); *Auto Club*, *supra* at 712-713.

Our review of the record in this case convinces us that by invoking its contempt power, the trial court was not trying to punish plaintiff for past misconduct because its dignity had been offended; it was instead attempting to coerce plaintiff into complying with its orders for parenting time and related orders intended to facilitate defendant's right to parenting time with his son. At the time of the July 27, 2007, show cause hearing, plaintiff was in violation of the trial court's past and then-current orders to provide defendant with two weeks of summer visitation "commencing June 30, 2007," and was then still under a future duty to provide defendant his two weeks of summer visitation and comply with other provisions of the court's parenting time order. See *Dougherty*, *supra* at 100. On entry of the contempt order of July 27, 2007, plaintiff could purge herself of contempt by paying the $1,000 sanction and complying with the order for specific makeup visitation. See *Auto Club*, *supra* at 712 ("Civil contempt ends when the contemnor complies with the court's order or is no longer able to do so *and* pays any fines or costs for the contempt proceedings.") (emphasis added); See, also, *Calcutt*, *supra* at 758, and MCL 600.1715(2). As this Court has observed, a party's parenting time rights might become meaningless if a court cannot enforce a visitation schedule through the use of its contempt powers. *Casbergue v Casbergue*, 124 Mich App 491, 494; 335 NW2d 16 (1983).

Our determination that the proceedings in this case to enforce the trial court's parenting time orders were civil, not criminal, is consistent with both caselaw and statutes governing domestic relations orders. In *Jaikins*, *supra* at 122, this Court held that contempt proceedings to enforce court-ordered visitation were civil and that the trial court erred when it did not permit the contemptuous party to purge himself of contempt. In a number of other cases, contempt proceedings to enforce visitation orders in divorce cases were held to be civil rather than criminal. See *Casbergue*, *supra* at 495; and *Watters v Watters*, 112 Mich App 1, 8; 314 NW2d 778 (1981). Moreover, under the Friend of the Court Act, MCL 552.501 *et seq*., and the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*., friends of the court are vested with the authority to initiate proceedings to enforce circuit court parenting time orders. MCL 552.644 authorizes a friend of the court to initiate civil contempt proceedings if administrative action to compel compliance with a parenting time order is unsuccessful. Although these statutory provisions apply to friends of the court, and therefore are not directly applicable to the present case where a party to a domestic relations matter directly initiates contempt proceedings, they express a policy that, generally, a trial court's invocation of its contempt authority to enforce a parenting time order is a civil proceeding.[3]

Next, we hold that defendant's failure to attach a supporting affidavit to his motions for orders to show cause as required by MCR 3.606(A) did not deprive the trial court of its jurisdiction over the contempt proceedings. We acknowledge that plaintiff cites a number of cases to support her argument. *In re Wood*, 82 Mich 75; 45 NW

[3] This is not to suggest that criminal contempt, where the only purpose is to punish the wrongdoer, may not be initiated in domestic relations case. See, e.g, *Henry*, *supra*.

1113 (1890); *Auto Club*, *supra* at 712-713; *In re Contempt of Robertson*, 209 Mich App 433; 531 NW2d 763 (1995); *In re Contempt of Nathan*, 99 Mich App 492, 494-495; 297 NW2d 646 (1980); *Michigan ex rel Wayne Prosecutor v Powers*, 97 Mich App 166, 168; 293 NW2d 752 (1980). But these and the similar cases cited are not helpful to us for a number of reasons, not the least of which is that most involve criminal contempt or apply statutes long since amended or superseded, or the pertinent portions are dicta. None of the cited cases applies current statutes or court rules governing domestic relations matters. For example, the seminal case, *Wood*, *supra* at 82, cites "How. Stat. §§ 7236, 7258, 7259" for the proposition that a proceeding for contempt committed not in the presence of the court "must be laid by affidavit." Section 7259, which is the predecessor of MCL 600.1711(2), provided that "when the misconduct charged was not committed in the presence of the court, 'the court shall be satisfied by due proof, *by affidavit*, of the facts charged, and shall cause a copy of such affidavit to be served on the party accused, a reasonable time to enable him to make his defense, except in cases of disobedience to any rule or order requiring the payment of money, and of disobedience to any subpoena.' " *Richter v Kabat*, 114 Mich 575, 580; 72 NW 600 (1897), quoting 2 How Stat 7259 (emphasis added.).

MCL 600.1711(2) now provides: "When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made *by affidavit or other method* and opportunity has been given to defend." (Emphasis added.) Furthermore, MCL 552.511b(1) provides that the friend of the court "shall initiate enforcement under the support and parenting time enforcement act if the office receives *a written complaint* that states specific facts constituting a custody or parenting time order

violation." (Emphasis added.) And, the friend of the court may initiate civil contempt proceedings "by filing with the circuit court *a petition* for an order to show cause why either parent who has violated a parenting time order should not be held in contempt." MCL 552.644(1).

We agree that MCR 3.606(A) is the default court rule governing the initiation of contempt proceedings for conduct occurring outside the immediate presence of a court. See *Henry*, *supra* at 667, and *Auto Club*, *supra* at 712-713. Furthermore, the court rules govern practice and procedure in our courts. *Nathan*, *supra* at 493-494. Still, the court rules also suggest that a civil contempt proceeding in a domestic relations case may be initiated on a written complaint or petition stating sufficient foundational facts on which to base a finding of contempt. See *Michigan Gas & Electric Co v Dowagiac*, 273 Mich 153, 156; 262 NW 762 (1935) ("[N]o valid order adjudging defendants guilty of contempt can be made unless the *petition or affidavits* made the basis of the order set forth the nature and cause of the accusations against them by setting up facts sufficient to constitute contempt as a matter of law."). Subchapter 3.200 of the Michigan Court Rules governs domestic relations matters, including visitation with minors. MCR 3.201(A)(2)(b). With respect to the friend of the court, MCR 3.208(A) incorporates the provisions of the Friend of the Court Act, MCL 552.501 *et seq*., and the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*. MCR 3.208(B) permits the friend of the court to initiate contempt proceedings on a petition for an order to show cause. With respect to parties, MCR 3.213 governs "Postjudgment Motions and Enforcement" and provides that "[p]ostjudgment motions in domestic relations actions are governed by MCR 2.119." The latter rule provides that a motion must "(a) be in writing, (b)

state with particularity the grounds and authority on which it is based, (c) state the relief or order sought, and (d) be signed by the party or attorney as provided in MCR 2.114." MCR 2.119(A)(1). MCR 2.119 does not require the filing of an affidavit, but if one is filed, it sets forth its required form. MCR 2.119(B); *In re Contempt of Steingold*, 244 Mich App 153, 158; 624 NW2d 504 (2000).

In Docket No. 285095, defendant filed his motion to show cause and attached to the motion several exhibits, including proof of service, letters, and e-mails. The motion itself did not satisfy the requirements of MCR 2.119(B) for affidavits. But it arguably stated with specificity facts regarding missed parenting time and telephone contact, which were sufficient to support a finding of contempt. *Mich Gas & Electric*, *supra* at 156; *Steingold*, *supra* at 158. The facts stated were also based on defendant's personal knowledge. *Id.* Furthermore, defendant signed the motion, declaring its statements "to be true to the best of [his] knowledge, information and belief." Defendant's certification of the motion for an order to show cause under MCR 2.114(D), as required by MCR 2.119(A)(1)(d), also rendered him subject to sanctions under MCR 2.114(E) if the allegations were untrue or submitted for an improper purpose. Thus, a motion for an order to show cause under MCR 2.119 and MCR 2.114 would accord protection against false allegations similar to that afforded by contempt proceedings initiated by affidavit. See *Campbell v Judge of Recorder's Court*, 244 Mich 165, 168; 221 NW 138 (1928).

Even assuming that MCR 3.606(A) applies in domestic relations cases, we still conclude that the lack of a notary affixed to defendant's petition for an order to show cause did not deprive the trial court of its juris-

diction to invoke its contempt powers in civil proceedings to enforce its own orders for parenting time, nor does the lack of notarization warrant setting aside the court's contempt orders. Once a circuit court obtains jurisdiction over divorce proceedings, it retains that jurisdiction over custody and visitation matters until the child attains the age of 18. MCL 552.17a(1); MCL 722.27(1)(c); *Harvey v Harvey*, 470 Mich 186, 193; 680 NW2d 835 (2004); *DenHeeten v DenHeeten*, 163 Mich App 85, 88; 413 NW2d 739 (1987). Moreover, Michigan courts have the inherent independent authority to punish a person for contempt. *Dougherty*, *supra* at 91 n 14; *Auto Club*, *supra* at 708-709. Consequently, even if the contempt proceedings were procedurally defective, the trial court was not deprived of its jurisdiction over the subject matter or the parties.

Contempt proceedings are referred to as quasi-criminal, see *Dougherty*, *supra* at 90, but even in a criminal case, an illegal arrest or arrest warrant issued on defective procedure will not divest a court of jurisdiction when the court has jurisdiction over the charged offense and the defendant appears before the court. See *People v Burrill*, 391 Mich 124, 127 n 2, 133; 214 NW2d 823 (1974); *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991). The sole effect of an illegal arrest is the possible suppression of evidence recovered as a result of the arrest. *Id*. Similarly, in *People v Hawkins*, 468 Mich 488, 495; 668 NW2d 602 (2003), the Court specifically addressed a violation of MCR 3.606(A) in that a "bench warrant petition was technically deficient in that it was not supported by affidavits as required by" the court rule. The Court found that the violation did not warrant application of the exclusionary rule. *Hawkins*, *supra* at 512. The Court concluded that the violation of the "technical provisions" of the court rule should not result in the harsh remedy of the exclusion-

ary rule. *Id*. at 513. Likewise, here, we find the lack of a notary affixed to defendant's petition for an order to show cause insufficient to deprive the trial court of jurisdiction or warrant reversal of an otherwise proper finding of contempt. See *Stoltman v Stoltman*, 170 Mich App 653, 657; 429 NW2d 220 (1988) ("Imperfect verification of a pleading is not a jurisdictional defect and may be cured by amendment."). Our review of the record convinces us that plaintiff was accorded rudimentary due process, and there was sufficient evidence of a willful violation of the court's order. We therefore decline to reverse on the basis of a technical violation of MCR 3.606(A).

In Docket No. 284086, defendant filed his January 31, 2008, motion for an order to show cause indicating that plaintiff had not approved a consent order required by the parties' family counselor and also that defendant had not paid court-ordered sanctions and attorney fees. The monetary assessments, except for $35 payable to the trial court's reporter, were required to be paid to defendant's attorney. A copy of defendant's attorney's e-mail requesting that plaintiff sign the proposed consent order was attached to the motion. Like in defendant's earlier motion for an order to show cause, both defendant and his attorney signed the January 31, 2008, motion for an order to show cause, consistent with the requirements of MCR 2.114, but they did not have it notarized. Therefore, the January 31, 2008, motion did not satisfy the requirements of MCR 2.119(B)'s for affidavits. Nevertheless, the motion stated with specificity facts within the personal knowledge of defendant or his attorney regarding plaintiff's lack of cooperation with the counselor and plaintiff's failure to pay previously ordered sanctions and attorney fees. The motion contained sufficient facts and inferences to support the issuance of an order to show cause

why plaintiff should not be found in contempt of court. *Michigan Gas & Electric*, *supra* at 156; *Steingold*, *supra* at 158. Again, we are convinced that plaintiff was accorded rudimentary due process and that sufficient evidence supported the trial court's February 13, 2008, contempt order. MCL 600.1711(2). We decline to reverse on the basis of a technical violation of MCR 3.606(A).

We find plaintiff's remaining issues to lack merit. Plaintiff asserts that a different judge should have presided over the contempt proceedings. Plaintiff, however, did not make this request in the trial court; consequently, this argument is not preserved. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). "We need not address issues first raised on appeal." *Id*. But, as noted, this issue is not meritorious. See *Henry*, *supra* at 675 ("The judge who presided over the proceedings in the context of which the indirect contumacious conduct occurred should preside over the contempt proceedings.").

Plaintiff next argues that the trial court erred by not conducting a hearing regarding her claimed indigence before finding her in contempt for failing to pay court-ordered sanctions and attorney fees. We find plaintiff's claim of poverty to be spurious and that the trial court did not err by summarily rejecting it. While the inability to comply with a court order might ordinarily be a defense to a charge of contempt, here, the record indicates that plaintiff's claim was without merit. At the December 19, 2007, show cause hearing, plaintiff's counsel admitted that plaintiff is a practicing attorney; she is married to a police officer, and she pays $16,000 a year in tuition so that the minor can attend a private school. In addition, plaintiff had the financial resources to employ counsel to contest every effort that defendant made to enforce the court's order providing that he

have minimal parenting time with his son. Consequently, we conclude that the trial court did not abuse its discretion by declining to conduct an evidentiary hearing.

Finally, plaintiff argues that the trial court abused its discretion by finding her in contempt for not cooperating with the family counselor because she would not approve a proposed consent order clarifying the counselor's responsibilities and authority that the counselor requested the parties to approve. The trial court's December 19, 2007, order provided: "The parties are referred to Siri Gottlieb, LMSW, JD, The Cooperative Parenting Center, LLC, Ann Arbor and shall attend and cooperate as directed by Ms. Gottlieb." As noted, Gottlieb requested that the parties approve a proposed order clarifying her role. Plaintiff refused. In the trial court she defended her position by arguing that if she had approved the proposed order, she would have waived her appellate rights. On appeal, plaintiff concedes her position below was legally untenable, citing *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74; 545 NW2d 4 (1996). Now, plaintiff argues that requiring her to approve the order Gottlieb requested was contrary to MCR 2.602(B). We do not consider the merits of this legal argument because it was not preserved for appeal. *Polkton Charter Twp*, *supra* at 95. " 'A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal.' " *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004), quoting *In re Contempt of Dudzinski*, 257 Mich App 96, 111; 667 NW2d 68 (2003).

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

INNOVATIVE ADULT FOSTER CARE, INC v RAGIN

Docket No. 284536. Submitted August 5, 2009, at Detroit. Decided September 8, 2009, at 9:00 a.m.

Innovative Adult Foster Care, Inc. (Innovative AFC), through Rene Harris and David Edwards, brought an action in the Oakland Circuit Court against John and Mary Ragin, seeking a declaratory judgment regarding which of two competing factions was in lawful control of the board of directors of Innovative AFC. The court, Edward Sosnick, J., granted summary disposition for John and Mary Ragin, determining that it was beyond genuine factual dispute that the three surviving incorporators of Innovative AFC, Rene Harris and John and Mary Ragin, remained the sole directors until July 14, 2007, at which time John and Mary Ragin, as two of the three surviving incorporators, legally took action to expand the board and elect several new directors. The court rejected as unsupported by any evidence the motion of the plaintiff for summary disposition that alleged that a different board of directors had been elected in 1999 and that that board had been reelected at a June 10, 2007, meeting. The plaintiff appealed.

The Court of Appeals *held*:

Summary disposition was improperly granted under MCR 2.116(C)(10) because a genuine issue of material fact remained concerning which of the two factions was in lawful control of the management and board of directors of Innovative AFC. The documentary evidence submitted by the plaintiff tended to establish the existence of a genuine factual dispute concerning the composition of the board of directors. The affidavit submitted by Rene Harris did contain sufficient detail to establish the existence of a genuine issue of material fact. The affidavit was not devoid of detail and it contained more than mere conclusory allegations. The trial court completely overlooked a discrepancy in the tax returns and annual corporate filings of the plaintiff that referred to directors other than the four original incorporators and that showed that there was conflicting evidence concerning whether the board of directors had ever been expanded before 2007. The order of summary disposition must be reversed and the matter must be remanded for further proceedings. If the trial court

determines on remand that the individuals who were allegedly elected to the board of directors in 1999 were not elected in 1999, that the action taken at the June 10, 2007, meeting was void and without effect, and that the three surviving incorporators remained the sole directors until July 14, 2007, the trial court should additionally consider whether Rene Harris received proper notice of the July 14, 2007, meeting. If the trial court determines that she did not receive proper notice, it should also determine, before declaring the rights and legal relations of the parties, what effect, if any, the lack of notice may have had on the validity of the actions taken at the July 14, 2007, meeting.

Reversed and remanded.

Maxwell Dunn, PLC (by *Brenda J. Maxwell*), for the plaintiff.

Susan A. Davis, *PLC* (by *Susan A. Davis*), for the defendants.

Before: STEPHENS, P.J., and JANSEN and WILDER, JJ.

JANSEN, J. In this declaratory-judgment action, plaintiff Innovative Adult Foster Care, Inc. (Innovative AFC), appeals by right the circuit court's opinion and order granting summary disposition in favor of defendants, John and Mary Ragin, pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings consistent with this opinion.

I

Innovative AFC is incorporated under the Michigan Nonprofit Corporation Act, MCL 450.2101 *et seq*., and is in the business of providing residential care for mentally ill and developmentally disabled adults. The four original incorporators of Innovative AFC were Gene Harris, his wife Rene Harris, Rene's father John Ragin, and John's wife Mary Ragin. For several years, the business of Innovative AFC was transacted smoothly and without significant disagreement. In the early

years of Innovative AFC's existence, the four original incorporators served as the board of directors. Gene Harris served as president and director, John Ragin served as vice president and director, Rene Harris served as secretary-treasurer and director, and Mary Ragin served as the fourth director.

Gene Harris died of a heart attack in 2004. Although Rene Harris continued to work well with defendants at first, a dispute soon developed. According to Rene Harris, defendants wanted to operate the business for their own gain, were not interested in operating the business in a financially sound manner, and had begun to feel threatened by her "meticulous accountability." In contrast, defendants contend that Rene Harris wanted to "split the company and take over one of its [group homes] to run independently herself." At any rate, irrespective of the exact cause of the dispute, it is clear that the three surviving incorporators became embroiled in a disagreement concerning the fundamental management and control of Innovative AFC.

Rene Harris called a special meeting of the board of directors for June 10, 2007. In addition to Rene Harris and John and Mary Ragin, David Edwards, George Williamson, Brenda Lester, Priscilla Murrell, Hazel Bartlett, Michelle Johnson, and Julian Watkins attended the meeting. Rene Harris informed everyone in attendance that Edwards, Williamson, Lester, Murrell, Bartlett, Johnson, and Watkins had been elected to the board of directors at the suggestion of her late husband, Gene Harris, apparently sometime in 1999. Rene Harris maintained that Edwards, Williamson, Lester, Murrell, Bartlett, Johnson, and Watkins had been elected by unanimous consent of the four original incorporators at that time.[1] Lester sug-

[1] Defendants, John and Mary Ragin, claim to have no knowledge that any of these individuals was ever elected to the board of directors.

gested that because Gene Harris was no longer alive and could not confirm what had occurred in 1999, those in attendance should vote to reaffirm the purported directorships of Edwards, Williamson, Lester, Murrell, Bartlett, Johnson, and Watkins. All those present, except defendants, voted to reaffirm the purported directorships, agreeing that Harris, Edwards, Williamson, Lester, Murrell, Bartlett, Johnson, and Watkins would serve as members of Innovative AFC's board of directors. All those present, except defendants, also voted to elect Edwards as chairman of the board of directors. Defendants protested the meeting's validity, did not vote at the meeting, did not consent to the purported election of directors, and did not otherwise participate in the proceedings.

Defendants, John and Mary Ragin, then called a special board of directors meeting for July 14, 2007. In addition to John and Mary Ragin, Derald Jones, Rajah Dixon, Gail Williams, Willie Boyd, Melissa Greer, Monique Anderson, and Vernice Hunt attended the meeting. It is unclear from the record whether Rene Harris ever received notice of this meeting. Nonetheless, it is undisputed that she did not attend. All those present on July 14, 2007, voted to elect Jones, Dixon, Williams, Boyd, Greer, Anderson, and Hunt to the board of directors. It was understood that defendants would continue to serve as directors as well. Those present then voted (1) to authorize Mary Ragin to relocate Innovative AFC's registered business office, (2) to dis-

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Defendants argue that they never voted to expand the size of the board of directors beyond the four original incorporators, and assert that they never voted to elect Edwards, Williamson, Lester, Murrell, Bartlett, Johnson, or Watkins, in 1999 or at any other time. Moreover, according to the minutes of the meeting of June 10, 2007, Edwards, Watkins, Bartlett, and Williamson stated that they had no knowledge that they had ever been elected to the board.

continue the use of stamped signatures on corporate checks and to require two signatures on all checks in the future, (3) to relocate the residents of one of Innovative AFC's group homes upon the licensing of a new facility and the approval of Macomb County Community Mental Health, and (4) to hire a certified public accountant for Innovative AFC.

John and Mary Ragin, Rajah Dixon, Willie Boyd, Melissa Greer, Monique Anderson, and Vernice Hunt met for a second time on July 25, 2007,[2] and voted unanimously to elect Mary Ragin as president of Innovative AFC, John Ragin as vice president of Innovative AFC, and Derald Jones as chairman of the board of directors. Someone in attendance noted that secretary-treasurer Rene Harris was not in attendance and suggested that her resignation or termination should be considered. However, John Ragin asked everyone to wait before taking action in this regard so that he could first contact Rene Harris and personally request her participation. Those present agreed to John Ragin's request, but voted to close Innovative AFC's existing bank account, to move all corporate assets to a new bank account, and to change the corporate mailing address to Eastpointe, Michigan.

II

Rene Harris and David Edwards, purportedly on behalf of Innovative AFC, commenced this declaratory-judgment action[3] in August 2007 for the purpose of

[2] Derald Jones and Gail Williams were not present at the meeting of July 25, 2007.

[3] In general, an action in quo warranto is the exclusive method by which to try title to the office of director in a private corporation. *Attorney General ex rel Dusenbury v Looker*, 111 Mich 498, 508; 69 NW 929 (1897). Nonetheless, we conclude that the instant suit was properly commenced

resolving which of the two competing factions was in lawful control of Innovative AFC's board of directors. Attached to the complaint as "Exhibit A" was a list of the individuals who had allegedly been elected to the board of directors at the suggestion of Gene Harris in 1999. Exhibit A included the names John Ragin, Mary Ragin, David Edwards, George Williamson, Brenda Lester, Priscilla Murrell, Hazel Bartlett, Michelle Johnson, and Julian Watkins.[4] Plaintiff alleged that the individuals listed on Exhibit A had been elected at the suggestion of Gene Harris sometime in 1999, that the individuals listed on Exhibit A constituted the true board of directors of Innovative AFC, that the individuals listed on Exhibit A had been properly reelected as directors at the meeting of June 10, 2007, and that the subsequent purported election of new directors at the meeting of July 14, 2007, was therefore void and without effect.

Defendants moved for summary disposition, arguing (1) that Edwards, Williamson, Lester, Murrell, Bartlett, Johnson, and Watkins had not been elected to the Innovative AFC board of directors in 1999 or at any other time, and (2) that no directors other than the original incorporators had ever been elected until the

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as a declaratory judgment action because "[t]here is something beside title to office here involved." *Komarynski v Popovich*, 218 Mich 481, 485; 188 NW 386 (1922). Indeed, the present case concerns not only title to the directorships of Innovative AFC, but also the fundamental management and control of the corporation itself. See *id*. Moreover, we note that declaratory relief is not precluded by the availability of another adequate remedy. MCR 2.605(C). We conclude that plaintiff was not required to bring this action in quo warranto, and that the circuit court was authorized to hear this matter as a declaratory judgment action.

[4] Exhibit A also listed the names of three other individuals who are not involved in this appeal. According to plaintiff, these three individuals had either resigned from the board in the intervening years or could not be located at the time the complaint was filed.

meeting of July 14, 2007. Defendants presented several of Innovative AFC's federal tax returns and annual corporate filings for the years 1999 through 2004, most of which listed Gene Harris, John Ragin, Rene Harris, and Mary Ragin as the sole directors of the corporation.[5] Similarly, defendants presented two subsequent corporate filings, both filed after the death of Gene Harris, which listed only John Ragin, Rene Harris, and Mary Ragin as directors of the corporation. Defendants also submitted affidavits in which they each averred, among other things, (1) that the four original incorporators of Innovative AFC were Gene Harris, Rene Harris, John Ragin, and Mary Ragin, (2) that "[t]he four incorporators . . . served as the initial board of directors," (3) that "[u]pon the death of Gene Harris, the remaining three incorporators served as the [b]oard of [d]irectors of the corporation," (4) that "[t]he initial board of directors did not elect any additional directors until July 2007," (5) that defendants had "never voted for any of the persons listed on . . . Exhibit A to plaintiff's complaint," and (6) that defendants had "attended the June 10 meeting only to protest the validity of the meeting."

In addition, defendants submitted copies of Innovative AFC's articles of incorporation and bylaws in support of their motion for summary disposition. The articles of incorporation clearly state that Innovative AFC's original four incorporators were Gene Harris, Rene Harris, John Ragin, and Mary Ragin. The bylaws provide in pertinent part (1) that "[t]he corporation

[5] Although all but one of the federal tax returns and annual corporate filings for the years 1999 through 2004 listed Gene Harris, John Ragin, Rene Harris, and Mary Ragin as the sole directors of the corporation, Innovative AFC's annual corporate filing for 2003 listed Gene Harris, Rene Harris, John Ragin, Mary Ragin, Monique Anderson, and Brenda Lester as directors of the corporation.

shall be managed by a governing board, which is herein referred to as the 'board of directors,' " (2) that "[t]he first board of directors shall consist of persons named as the initial [incorporators] in the certificate of incorporation and shall hold office . . . until their successors have been elected and qualified," (3) that "[t]hereafter, directors . . . shall be elected at annual meetings of the board of directors by a plurality of the votes cast," (4) that "[t]he number of directors may be increased or decreased by action of the directors, provided that any action of the directors to effect such increase or decrease shall require the vote of a majority of the entire board," and (5) that "[i]n the interim between annual meetings of directors or special meetings of directors called for the election of directors, newly created directorships and any vacancies in the board of directors, including vacancies resulting from the removal of directors for cause, may be filled by the vote of the remaining directors then in office, although less than a quorum."

Defendants argued that the three surviving incorporators remained the sole directors of Innovative AFC until July 14, 2007, at which time new directors were validly elected. Specifically, defendants contended (1) that the purported election of directors at the meeting of June 10, 2007, was void and without effect because only one of the three surviving incorporators, Rene Harris, had participated, and (2) that defendants John and Mary Ragin constituted a quorum of the three surviving incorporators, and were accordingly authorized to expand the size of the board of directors and elect new directors at the meeting of July 14, 2007.

In response to defendants' motion for summary disposition, plaintiff submitted the affidavit of Rene Harris. In her affidavit, Rene Harris averred, among other things, that the four original incorporators had

met sometime in 1999 and had "unanimously agreed" at the suggestion of Gene Harris to expand the size of the board of directors and to elect the individuals listed on Exhibit A as the directors of Innovative AFC.

Relying on defendants' affidavits, as well as the federal tax returns and annual corporate filings, the circuit court granted summary disposition in favor of defendants, ruling that it was beyond genuine factual dispute that the three surviving incorporators remained the sole directors of Innovative AFC until July 14, 2007, at which time defendants, as two of the three surviving incorporators, legally took action to expand the board and elect several new directors. The circuit court gave no consideration to the affidavit of Rene Harris, ruling that it was merely conclusory and contained insufficient evidentiary detail to create a genuine issue of material fact for trial. The circuit court remarked that plaintiff had "not presented any evidence" to support its assertion that the individuals listed on Exhibit A were ever elected to Innovative AFC's board of directors in 1999.

Plaintiff moved for reconsideration of the circuit court's opinion and order, but the motion was denied.[6]

III

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a

[6] Attached to the motion for reconsideration, plaintiff submitted several affidavits in support of its assertion that that the individuals listed on Exhibit A were elected to Innovative AFC's board of directors in 1999. The circuit court properly declined to consider these affidavits, which were presented for the first time in support of plaintiff's motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). We similarly decline to consider on appeal the contents of these untimely filed affidavits. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must first "specifically identify the issues as to which [it] believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and has the initial burden of supporting its position with affidavits, depositions, admissions, or other admissible documentary evidence, MCR 2.116(G)(3)(b); MCR 2.116(G)(6); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Once this initial burden has been met, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact for trial. *Id*. "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id*. In determining whether a genuine issue of material fact exists, the court must consider all documentary evidence in a light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

We review de novo a circuit court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Our

review is limited to the evidence that had been presented to the circuit court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Courts are liberal in finding a factual dispute sufficient to withstand summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005); *Porter v Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995).

IV

After having thoroughly reviewed the record evidence presented to the circuit court in this case, we conclude that there remained a genuine issue of material fact concerning which of the two factions was in lawful control of the management and board of directors of Innovative AFC. Accordingly, we conclude that summary disposition for defendants was improperly granted.

Plaintiff contends that the individuals listed on Exhibit A to the complaint were elected to Innovative AFC's board of directors at the suggestion of Gene Harris sometime in 1999, and that they were subsequently reelected to the board of directors at the meeting of June 10, 2007. Specifically, plaintiff asserts (1) that the meeting of June 10, 2007, was properly convened as a meeting of Innovative AFC's then-existing board of directors, (2) that the meeting was valid and lawful, (3) that Rene Harris, David Edwards, George Williamson, Brenda Lester, Priscilla Murrell, Hazel Bartlett, Michelle Johnson, and Julian Watkins were reelected as directors of the corporation at that time, (4) that Edwards was elected as chairman of the board of directors at that time, (5) that defendants, as a minority of the board, had no authority to call the subsequent meeting of July 14, 2007, and (6) that the

purported election of new directors at the meeting of July 14, 2007, was therefore void and without effect.

In contrast, defendants assert (1) that there is no evidence that the individuals listed on Exhibit A were ever elected to Innovative AFC's board of directors in 1999, (2) that neither John Ragin nor Mary Ragin ever voted to elect any of the individuals listed on Exhibit A, (3) that neither John Ragin nor Mary Ragin ever voted to expand the size of the board of directors beyond the original four incorporators until the meeting of July 14, 2007, (4) that the three surviving incorporators remained the sole directors of Innovative AFC until the meeting of July 14, 2007, (5) that Rene Harris was without authority to unilaterally call the special meeting of June 10, 2007, (6) that the purported election of directors on June 10, 2007, was void and without effect because it occurred at an improperly convened meeting and garnered the vote of only one of the three surviving incorporators, and (7) that defendants, as a majority of the surviving incorporators, were legally authorized to convene the special meeting of July 14, 2007, to expand the size of the board of directors at that time, and to elect new directors for the corporation.

When conflicting evidence has been presented, whether an election of corporate directors was in fact held, and whether directors were in fact elected, are generally questions of fact. *Zachary v Milin*, 294 Mich 622, 626-627; 293 NW 770 (1940); see also *In re Tonopah United Water Co*, 16 Del Ch 26, 33; 139 A 762 (1927). Similarly, whether a particular person is a member of a corporate board of directors is generally a question of fact. *Shwiff v City of Dallas*, 327 SW2d 598, 602 (Tex App, 1959). Finally, although the general rule is that "the status of a person as corporate director . . . is presumed to have continued as long as is usual

in the absence of contrary evidence," 2 Fletcher Cyclopedia of the Law of Corporations, § 282, pp 57-58, whether a validly elected corporate director has continued in office presents a question of fact when there is conflicting evidence on the subject, *Sager Spuck Statewide Supply Co, Inc v Meyer*, 273 AD2d 745, 748; 710 NYS2d 429 (2000).

In support of their motion for summary disposition, defendants submitted documentary evidence tending to show that the individuals listed on Exhibit A were never elected to Innovative AFC's board of directors and that the three surviving incorporators remained the sole directors of the corporation until the special meeting of July 14, 2007. As noted previously, defendants submitted several federal tax returns and annual corporate filings, most of which listed Gene Harris, John Ragin, Rene Harris, and Mary Ragin as the only directors of the corporation. Similarly, defendants presented two subsequent corporate filings, both filed after the death of Gene Harris, which listed only John Ragin, Rene Harris, and Mary Ragin as directors of the corporation. Defendants also submitted affidavits in which they averred (1) that the four original incorporators of Innovative AFC were Gene Harris, Rene Harris, John Ragin, and Mary Ragin, (2) that "[t]he four incorporators . . . served as the initial board of directors," (3) that "[u]pon the death of Gene Harris, the remaining three incorporators served as the [b]oard of [d]irectors of the corporation," (4) that "[t]he initial board of directors did not elect any additional directors until July 2007," (5) that defendants had "never voted for any of the persons listed on . . . Exhibit A to plaintiff's complaint," and (6) that defendants had "attended the June 10 meeting only to protest the validity of the meeting."

But plaintiff responded with its own documentary evidence, albeit sparse, tending to establish the existence of a genuine factual dispute concerning the composition of Innovative AFC's board of directors. Although Rene Harris's affidavit was not greatly detailed, it did constitute admissible evidence that David Edwards, George Williamson, Brenda Lester, Priscilla Murrell, Hazel Bartlett, Michelle Johnson, and Julian Watkins had been elected as directors of the corporation sometime in 1999. Specifically, Rene Harris averred that the four original incorporators had met sometime in 1999 and had "unanimously agreed" to elect the individuals listed on Exhibit A to the board of directors of Innovative AFC. Contrary to the ruling of the circuit court, this affidavit did contain sufficient detail to establish the existence of a genuine issue of material fact. See *Bennett v Detroit Police Chief*, 274 Mich App 307, 318-319; 732 NW2d 164 (2007) (holding that a speculative affidavit, which contained mere conjecture, was insufficient to create a genuine issue of material fact for trial). Unlike the affidavit that our Supreme Court found insufficient to establish the existence of a material factual dispute in *Quinto*, Rene Harris's affidavit in this case was not "devoid of detail" and contained more than "mere conclusory allegations . . . ." *Quinto*, 451 Mich at 371.

Furthermore, although most of the federal tax returns and annual corporate filings submitted by defendants listed Gene Harris, John Ragin, Rene Harris, and Mary Ragin as the only directors of Innovative AFC, the annual corporate filing for 2003 listed Gene Harris, Rene Harris, John Ragin, Mary Ragin, Monique Anderson, and Brenda Lester as directors of the corporation. The circuit court completely overlooked this discrepancy in the tax returns and annual corporate filings, ruling that the documents conclusively established that the surviving incorporators

were the sole directors of Innovative AFC. We acknowledge that the overwhelming majority of the tax returns and annual corporate filings appeared to support defendants' position in this case, and that only one of the several federal and state documents submitted to the circuit court referred to directors other than the four original incorporators. But it is well settled that the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007); *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997).

Quite simply, there was conflicting evidence before the circuit court concerning whether the size of the board of directors had ever been expanded before 2007, and whether any additional individuals, beyond the original four incorporators, had ever been elected to the board before 2007. Although the weight of the evidence appears to have favored defendants in this case, the circuit court was not entitled to decide issues of weight or credibility at the summary disposition stage of the proceedings. *Skinner*, 445 Mich at 161. Viewing the documentary evidence in a light most favorable to the nonmoving party as we must, *DeBrow*, 463 Mich at 538-539, we conclude that there remained genuine issues of material fact with respect to the size and membership of Innovative AFC's board of directors and that summary disposition was therefore improperly granted for defendants.

V

Because we have reversed the grant of summary disposition and must remand this matter to the circuit court for

further proceedings, we address one additional issue that may also be relevant on remand. The law in Michigan is that "[a] special meeting held in the absence of some of the directors, without any notice to them as . . . prescribed [in the bylaws], is illegal, and the action of the meeting, although by a majority of the directors, is generally invalid." 6 Michigan Civ Jur, Corporations, § 104, p 199; see also *Broughton v Jones*, 120 Mich 462, 464; 79 NW 691 (1899). If the circuit court[7] determines on remand that the individuals listed on Exhibit A were never elected to the board of directors in 1999, that the action taken at the meeting of June 10, 2007, was void and without effect, and that the three surviving incorporators remained the sole directors of the corporation until July 14, 2007, the court should additionally consider whether Rene Harris ever received proper notice of the meeting of July 14, 2007. If the circuit court concludes that Rene Harris did not receive proper notice of the meeting of July 14, 2007, it should also determine, before declaring the rights and legal relations of the parties, what effect, if any, this lack of notice may have had on the validity of the actions taken by defendants at the meeting of July 14, 2007.

VI

In sum, because there remained genuine issues of material fact with respect to the size and membership of

[7] A party may request that a jury resolve the disputed issues of fact in a declaratory-judgment action if a jury trial would be otherwise provided for by law. *Comm'r of Ins v Michigan State Accident Fund Advisory Bd*, 173 Mich App 566, 586; 434 NW2d 433 (1988). However, the party must make a timely jury demand "under the circumstances and in the manner provided in the constitution, statutes, and court rules of the State of Michigan." MCR 2.605(B). There was no jury demand filed in this case by either party. See MCR 2.508(B). Accordingly, this action must be tried without a jury on remand. MCR 2.509(B).

Innovative AFC's board of directors, the circuit court erred by granting summary disposition for defendants.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

FLINT COLD STORAGE v DEPARTMENT OF TREASURY

Docket No. 286921. Submitted September 1, 2009, at Lansing. Decided September 8, 2009, at 9:05 a.m.

Flint Cold Storage, a closely held Michigan corporation that was dissolved in October 1975, and whose final annual report, dated July 15, 1975, indicates that Vincent Meli was the president, his wife, Pauline Meli, was the secretary, and their son, Angelo Meli, was the vice president, brought an action in 2007 in the Ingham Circuit Court against the Department of Treasury, alleging that it was the rightful owner of unclaimed funds held by the defendant's unclaimed property division. The funds had been sent to the defendant in 2003 by Metropolitan Life Insurance Company when it was unable to locate the plaintiff during its process of distributing demutualization funds to its policyholders. The plaintiff had purchased a life insurance policy on the life of Vincent Meli sometime before its dissolution. Vincent died in 2003, survived by his wife and son. Upon learning of the unclaimed funds, Pauline attempted to claim the funds in her capacity as an officer of the dissolved corporation. The defendant denied the claim, stating that the funds belonged to the shareholders of the dissolved corporation at the time of dissolution and that the shareholders had not been identified. The court, Laura L. Baird, J., granted summary disposition for the defendant, ruling that the plaintiff lacked the capacity to sue because it was no longer winding up its affairs. The plaintiff appealed.

The Court of Appeals *held*:

1. MCL 450.1833 and MCL 450.1834 provide that a dissolved Michigan corporation may continue to exist beyond the date of dissolution only until it has concluded winding up its affairs.

2. Chapter 8 of the Business Corporation Act, MCL 450.1801 *et seq*., governs the dissolution and winding up of Michigan corporations. The act does not provide an express time limitation for the winding up of corporate affairs. Therefore, a corporation must finish liquidating its business and complete the winding up process within a reasonable time. What constitutes a reasonable time is generally a question of law for the court. A 32-year winding up period, as was argued in this case, is not reasonable.

3. Once a dissolved corporation has finished winding up its affairs, its existence is terminated and it ceases to exist for all purposes. Once the existence of a dissolved corporation has terminated, it loses the powers enumerated in MCL 450.1833 and MCL 450.1834, including the power to sue and be sued. The plaintiff lacked the capacity to sue and be sued under the Business Corporation Act once its corporate existence terminated.

4. Only an existing legal or commercial entity may bring suit to recover unclaimed property under MCL 567.247 of the Uniform Unclaimed Property Act. The trial court properly determined that the plaintiff lacked the capacity to sue.

Affirmed.

1. CORPORATIONS — BUSINESS CORPORATION ACT — DISSOLUTION — WINDING UP.

The provisions of the Business Corporation Act governing the dissolution and winding up of Michigan corporations do not provide an express time limitation for the winding up of corporate affairs; therefore, the winding up process must be completed within a reasonable time (MCL 450.1801 *et seq*.).

2. CORPORATIONS — DISSOLUTION — WINDING UP.

Once a dissolved corporation has finished winding up its affairs, its existence is terminated and it ceases to exist for all purposes and may not thereafter exercise the powers to sue and be sued enumerated in the Business Corporation Act (MCL 450.1833 and 450.1834).

3. ACTIONS — UNIFORM UNCLAIMED PROPERTY ACT — SUITS TO RECOVER UNCLAIMED PROPERTY.

Only an existing legal or commercial entity may bring suit to recover unclaimed property under the Uniform Unclaimed Property Act (MCL 567.222[m] and 567.247).

Law Offices of Ezra N. Goldman, P.C. (by *Ezra N. Goldman*), for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heidi L. Johnson-Mehney*, Assistant Attorney General, for the defendant.

Before: JANSEN, P.J., and FORT HOOD and GLEICHER, JJ.

JANSEN, P.J. In this action brought under MCL 567.247 to recover unclaimed property, plaintiff Flint Cold Storage appeals by right the circuit court's grant of summary disposition in favor of defendant Department of Treasury.[1] We affirm.

I

Flint Cold Storage was a closely held Michigan corporation, established for the purpose of providing refrigerated cold storage for perishable products. It was incorporated in 1946 or 1947, and dissolved in October 1975. Plaintiff's final annual report, dated July 15, 1975, indicates that Vincent Meli was the president, that his wife Pauline Meli was the secretary, and that their son Angelo Meli was the vice president.[2] At some point before its dissolution, Flint Cold Storage purchased a life insurance policy on the life of Vincent Meli from Metropolitan Life Insurance Company (MetLife).

MetLife demutualized in 2000[3] and began distributing demutualization funds to its policyholders. MetLife

[1] Throughout the lower court proceedings in this case, the only named defendant was Gonzalo Llano, the director of the Department of Treasury's Unclaimed Property Division. However, MCL 567.247 specifically directs that a plaintiff who brings an action in circuit court to recover unclaimed property must "nam[e] the administrator as a defendant." For the purposes of Michigan's Uniform Unclaimed Property Act (UUPA), MCL 567.221 *et seq*., " '[a]dministrator' means the state treasurer." MCL 567.222(a). Accordingly, the proper defendant in this action is the Department of Treasury, and not the director of the Unclaimed Property Division. See MCR 7.216(A)(2).

[2] The 1975 annual report actually lists "Angela Meli" as vice president. However, this appears to have been a typographical error. Documents contained in the lower court file tend to establish that there was never any member of the Meli family with the name "Angela." Moreover, other independent evidence indicates that Angelo Meli was the vice president.

[3] "Demutualization" is the process of converting from a mutual insurance company, which is owned by policyholders, to a stock insurance

was unable to locate Flint Cold Storage, presumably because the corporation had been dissolved years earlier and no longer conducted business. Therefore, in 2003, MetLife sent $188,679.99 in demutualization funds, payable to Flint Cold Storage, to defendant's Unclaimed Property Division.[4]

Vincent Meli died in 2003, survived by his wife and son. Upon learning of the existence of the unclaimed $188,679.99, Pauline Meli attempted to claim the property in her capacity as an officer of the dissolved corporation. The Unclaimed Property Division requested documentation to prove that she was entitled to collect the unclaimed funds. Pauline Meli responded to the request by providing a copy of Flint Cold Storage's 1975 annual report, proof that she was the widow of Vincent Meli, and proof that she, her son, and her late husband were the sole officers of Flint Cold Storage at the time of its dissolution in 1975. She presented no proof of the identity of the historic shareholders of Flint Cold Storage. Nor did she provide any bylaws, board meeting minutes, stock certificates, tax returns, or other annual reports of Flint Cold Storage. As was later discovered, the Michigan Department of Labor & Economic Growth[5] had either inadvertently destroyed

company, which is owned by shareholders. Black's Law Dictionary (7th ed); see also *Bank of New York v Janowick*, 470 F3d 264, 267 (CA 6, 2006). For the purposes of the UUPA, " 'demutualization' means the payment of consideration for the relinquishment of a mutual membership interest in a mutual insurance company, regardless if undertaken in conjunction with a plan of demutualization, liquidation, merger, or other form of reorganization." MCL 567.228b(3).

[4] MCL 567.228b(1)(a) provides that funds distributable in the course of the demutualization of an insurance company are "presumed abandoned" after two years from the date of the demutualization "if the funds remain unclaimed and the owner has not otherwise communicated with the holder [of the funds] or its agent regarding the property . . . ."

[5] The former Department of Labor & Economic Growth is now the Department of Energy, Labor & Economic Growth.

its records concerning Flint Cold Storage or had destroyed them in the ordinary course of business. At any rate, it is beyond dispute that the department no longer retained any documents pertaining to the dissolved corporation. Electronic correspondence contained in the lower court file shows that Pauline Meli's son, Angelo Meli, attempted to obtain copies of plaintiff's tax returns from the Internal Revenue Service. However, he was apparently unsuccessful.

On May 7, 2007, defendant denied the claim. On June 15, 2007, plaintiff commenced this action in the Ingham Circuit Court pursuant to MCL 567.247. Plaintiff alleged that it was the rightful owner of the $188,679.99 in unclaimed funds and contended that it had done everything in its power to prove this to defendant. Plaintiff pointed out that there was no other claimant of the funds, and asserted that defendant had "no basis for withholding . . . payment" of the funds.

Defendant admitted that the Unclaimed Property Division was "holding property in the amount of $188,679.99 under the name Flint Cold Storage." Defendant also acknowledged that Pauline Meli "was an officer of Flint Cold Storage for at least the year 1975." However, defendant asserted that because plaintiff had only produced an annual report from 1975, it could not be certain of the identity of the corporation's officers for any other year. Similarly, defendant asserted that it could not be certain of the identity of Flint Cold Storage's historic shareholders because plaintiff had produced no stock certificates or other documentation.

Defendant contended that Flint Cold Storage no longer existed as a legal entity and that the rightful owners of the unclaimed funds were therefore the historic shareholders of the dissolved corporation at the time of dissolution. However, defendant asserted that it

did "not know who the shareholders were at the time of dissolution, as [defendant] has not been provided with this information by any representative of the plaintiff, or any other person." Because the historic shareholders had not been identified, defendant maintained that it was unable to release the $188,679.99.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it was beyond genuine factual dispute that Flint Cold Storage was the rightful owner of the unclaimed funds. Plaintiff argued that although it had dissolved in 1975, it had the authority under MCL 450.1833 "to continue doing business after dissolution for the purpose of collecting its assets." Plaintiff also argued that, though dissolved, it still had the power to sue and to hold assets under the provisions of MCL 450.1834. In addition to the 1975 annual report of Flint Cold Storage, plaintiff submitted a warranty deed, dated March 3, 1975, by which Flint Cold Storage sold and conveyed its real property at 925 South Dort Highway, Flint,[6] for the amount of $180,000. The warranty deed was signed by Vincent Meli, as president of Flint Cold Storage, and Pauline Meli, as secretary of Flint Cold Storage. Plaintiff argued that the 1975 annual report proved that Vincent Meli, Pauline Meli, and Angelo Meli were the only officers of Flint Cold Storage at the time of its dissolution in 1975. Plaintiff further argued that the warranty deed proved that Vincent Meli and Pauline Meli had been authorized to act on behalf of the corporation before its dissolution.

Defendant responded to plaintiff's motion for summary disposition by arguing that Flint Cold Storage no longer existed as a legal entity and that the rightful

[6] This is the same street address listed for Flint Cold Storage on the report of the Unclaimed Property Division that describes the $188,679.99 in unclaimed funds.

owners of the unclaimed funds were therefore the historic shareholders of Flint Cold Storage at the time of dissolution. Because the identity of these historic shareholders had not been proven, defendant argued that plaintiff's motion for summary disposition should be denied. In the meantime, defendant had served plaintiff with several interrogatories and requests to admit. In its response of February 14, 2008, plaintiff admitted, among other things, that it could not "produce any Flint Cold Storage stock certificates" and that it could not "produce any documents indicating the names of the individuals who were shareholders and/or their percentage ownership at the time of dissolution of the corporation."

Defendant then filed its own motion for summary disposition pursuant to MCR 2.116(C)(5) and (10). Defendant argued that Flint Cold Storage lacked the capacity to sue because it no longer existed. Defendant asserted that Flint Cold Storage could not possibly be still winding up its affairs more than 32 years after dissolution, and that the dissolved corporation had therefore ceased to exist as a legal entity. Accordingly, defendant argued that Flint Cold Storage no longer possessed the power to sue and be sued, and that summary disposition should be granted in its favor under MCR 2.116(C)(5).

Defendant also argued that even if Flint Cold Storage had not altogether ceased to exist as a legal entity, summary disposition should be granted pursuant to MCR 2.116(C)(10) because it was beyond factual dispute that the dissolved corporation, itself, was not the rightful owner of the $188,679.99 in unclaimed funds. Specifically, defendant contended that even if Flint Cold Storage was still arguably winding up its affairs after more than 32 years, the rightful owner of

the unclaimed funds was no longer the dissolved corporation. Defendant argued that, more than 32 years having passed since the 1975 dissolution, the unclaimed funds now rightfully belonged to Flint Cold Storage's individual historic shareholders—*not* to the dissolved corporation itself. Defendant pointed out that plaintiff had admitted that it could not "produce any documents indicating the names of the individuals who were shareholders and/or their percentage ownership at the time of dissolution of the corporation."

Plaintiff responded to defendant's motion by arguing that it retained the capacity to sue and be sued and was the proper party to pursue this action. Relying on MCL 450.1833 and 450.1834, plaintiff asserted that it still existed as a legal entity and was authorized to continue its existence for as long as was necessary to wind up its affairs. Plaintiff argued that, as part of the winding up process, it was entitled to collect its assets, such as the $188,679.99 in unclaimed funds. In addition, plaintiff submitted the affidavit of Pauline Meli, dated April 29, 2008, in which she averred that "[t]he last shareholders of Flint Cold Storage were myself, my late husband Vincent Meli, and my late mother in law, Jenny Meli."

After hearing oral argument, the circuit court granted summary disposition in favor of defendant, presumably pursuant to MCR 2.116(C)(5), ruling:

> It seems like the equities are with the plaintiff, and I don't find the law particularly illuminating.
>
> But what I—I am going to rule in favor the defendant and against the plaintiff. I'm going to give you my reasoning. I am going to read it into the record so you've got it, in case you need it for further action.
>
> * * *

First, I'm going to address the (C)(10) claim. A motion under this subrule tests whether there's a question of material fact for trial. . . .

In my mind the main issue in this case centers on interpreting the Business Corporation Act. MCL . . . 450.1833 states a dissolved corporation shall continue its corporate existence but shall not carry on business except for the purpose of winding up its affairs. MCL 450.1834 states, subject to section 833, and except as otherwise provided by court order, a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred.

[MCL 450.1834(e)] states that the corporation may sue and be sued in its corporate name and process may issue by and against the corporation in the same manner as if dissolution had not occurred.

The . . . Michigan Court of Appeals in [*Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98; 677 NW2d 856 (2003)], states that at common law a dissolved corporation is a dead person . . . . The Court also reasoned that the legislature has provided for the orderly winding up of corporate affairs.

Although it's feasible that the money truly does belong to the plaintiff, it can't be said that after 33 years the plaintiff is still winding up its business. While the plaintiff only had a cause of action since 2003, 2004 or 2005, when the money was deposited doesn't seem to be exactly relevant to my decision . . . . The corporation was still dissolved in 1975.

The Court must follow the plain language of the statute and the intent of the legislature. This corporation has not conducted business in 33 years or filed annual reports. It was dissolved 33 years ago. Therefore, by my reading of MCL 450.1833 it cannot be said that the corporation is still winding up its affairs. And, as a result, the corporation can't file suit under [MCL 450.1834]. Therefore, plaintiff's motion is denied and the defendant's is granted.

II

We review de novo the circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702, 705; 698 NW2d 402 (2005). Summary disposition is properly granted pursuant to MCR 2.116(C)(5) if "[t]he party asserting the claim lacks the legal capacity to sue." "In reviewing a grant of a motion for summary disposition pursuant to MCR 2.116(C)(5), we must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Rohde*, 265 Mich App at 705. We also review de novo questions of statutory interpretation, *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008), and all other questions of law, *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006).

III

The Uniform Unclaimed Property Act (UUPA), MCL 567.221 *et seq*., provides a mechanism by which the state may hold certain unclaimed property in trust for the benefit of the rightful owner. The UUPA applies to both tangible and intangible property that is in the possession of a "holder." See MCL 567.222(n); MCL 567.223(1). A "holder" is "a person, wherever organized or domiciled," who is "[i]n possession of property belonging to another," "[a] trustee," or "[i]ndebted to another on an obligation." MCL 567.222(h)(*i*), (*ii*), and (*iii*). In general, "all property, including any income or increment derived from the property, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and remains unclaimed by the owner for more than 5 years after it becomes payable or distributable is presumed abandoned." MCL

567.223(1). However, certain types of property are subject to specific presumptions of abandonment that provide for longer or shorter periods. See MCL 567.225 through 567.237. Of particular relevance here, funds that are "distributable in the course of the demutualization of an insurance company" are presumed abandoned "2 years after the date of the demutualization, if the funds remain unclaimed and the owner has not otherwise communicated with the holder [of the funds] or its agent regarding the property as evidenced by a memorandum or other record on file with the holder or its agent." MCL 567.228b(1)(a). Once property is presumed abandoned under one of these provisions, it "is subject to the custody of this state as unclaimed property" if one or more of the several conditions listed in MCL 567.224 has been met. Property that is both presumed abandoned and subject to the custody of the state under MCL 567.224 must generally be paid or delivered to the state treasurer. See MCL 567.240(1).

The UUPA goes on to provide that "[a] person, excluding another state, claiming an interest in any property paid or delivered to the [state treasurer] under this act, may file with the [state treasurer] a claim on a form prescribed by the [state treasurer] and verified by the claimant." MCL 567.245(1). The state treasurer must then consider the claim "within 90 days after it is filed and give written notice to the claimant if the claim is denied in whole or in part." MCL 567.245(2). "If a claim is allowed, the [state treasurer] shall pay over or deliver to the claimant the property or the amount the [state treasurer] actually received or the net proceeds if it has been sold by the [state treasurer], plus any additional amount required by [MCL 567.242]." MCL 567.245(3).

The UUPA also creates a cause of action for claimants whose claims are denied or not timely processed, permitting such persons to bring suit in circuit court. Specifically, the UUPA provides that "[a] person who is aggrieved by a decision of the [state treasurer] or whose claim has not been acted upon within 90 days after its filing may bring an action to establish the claim in the circuit court, naming the [state treasurer] as a defendant." MCL 567.247. Such an action must be commenced "within 90 days after the decision of the [state treasurer] or within 180 days after the filing of the claim if the [state treasurer] has failed to act on it." *Id*. The UUPA provides that "[i]f the aggrieved person establishes the claim in an action against the [state treasurer], the court shall award the claimant costs and reasonable attorney's fees." *Id*.[7]

IV

Relying on MCL 450.1833 and 450.1834, plaintiff argues that it continued to exist as a legal entity beyond the date of its 1975 dissolution and therefore retained the capacity to commence this action in circuit court pursuant to MCL 567.247. We cannot agree.

Statutory interpretation requires that we "give effect to the intent of the Legislature as expressed by the plain meaning of the statute." *Grand Traverse Co v Michigan*, 450 Mich 457, 463; 538 NW2d 1 (1995). We must begin by examining the statutory language itself.

[7] The state treasurer is authorized to "promulgate rules necessary to carry out the provisions of [the UUPA] under the administrative procedures act," MCL 567.260, but has not done so. Indeed, defendant admitted during discovery in this case that "[t]he Department of Treasury has not promulgated any administrative rules that affect the Unclaimed Property Division." However, defendant also admitted that the Unclaimed Property Division "has written internal operating policies," including a policy "for dealing with claims by dissolved businesses."

DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000). "Where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Id*. Statutes are considered *in pari materia* if they relate to the same subject matter or share a common purpose. *Palmer v State Land Office Bd*, 304 Mich 628, 636; 8 NW2d 664 (1943). Statutes that are *in pari materia* "must be read together as constituting one law, even if they contain no reference to one another and were enacted on different dates." *Crawford Co v Secretary of State*, 160 Mich App 88, 95; 408 NW2d 112 (1987).

Chapter 8 of the Business Corporation Act (BCA), 450.1801 *et seq*., governs the dissolution and winding up of Michigan corporations. Of particular relevance in the present case, the BCA provides that "a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred," MCL 450.1834, and that a dissolved corporation may continue to "sue and be sued in its corporate name . . . in the same manner as if dissolution had not occurred," MCL 450.1834(e); see also *Freeman v Hi Temp Products, Inc*, 229 Mich App 92, 96; 580 NW2d 918 (1998) (stating that "the general rule is that a dissolved corporation can sue and be sued"). However, the BCA expressly makes MCL 450.1834 "[s]ubject to section 833," which provides that although "a dissolved corporation shall continue its corporate existence," it "shall not carry on business except for the purpose of winding up its affairs . . . ." MCL 450.1833. Reading MCL 450.1833 and 450.1834 together as we must, *Crawford Co*, 160 Mich App at 95, it is clear that a dissolved Michigan corporation may

continue to exist beyond its date of dissolution only until its has concluded "winding up its affairs . . . ." MCL 450.1833.

Under Michigan's former General Corporation Act (GCA), a dissolved corporation had only three years after its date of dissolution for the winding up of corporate affairs. Former MCL 450.75; see also *Striker v Chesler*, 42 Del Ch 578, 585; 217 A2d 31 (1966) (interpreting Michigan's former GCA). Most provisions of the former GCA, including those relating to corporate dissolution and winding up, have now been repealed and replaced by the BCA. MCL 450.2098(b). In contrast to the former GCA, the BCA provides no specific period in which a dissolved corporation must complete the winding up process. We must conclude that the Legislature's omission of such a specific period from the BCA was intentional. *People v Stickle*, 156 Mich 557, 562-563; 121 NW 497 (1909); see also *In re Herbach Estate*, 230 Mich App 276, 286; 583 NW2d 541 (1998).

But the omission of such a time limitation from the BCA does not mean that a dissolved corporation may continue winding up its affairs indefinitely. We are persuaded that there necessarily must be an end to the winding up process—a point in time when a dissolved corporation is terminated and ceases to exist for all purposes. Otherwise, a dissolved corporation would languish in perpetuity, affording no true closure or finality for the stakeholders of the dissolved entity. This surely cannot be what the Legislature intended when it provided for the orderly liquidation and winding up of dissolved corporations. See MCL 450.1833; see also *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 113; 677 NW2d 856 (2003). Instead, we believe that the Legislature intended " 'to establish a definite point in time when a corporation ceases to exist.' " *Id*. at 124,

quoting *Blankenship v Demmler Mfg Co*, 89 Ill App 3d 569, 574; 411 NE2d 1153 (1980); see also *Bishop v Schield Bantam Co*, 293 F Supp 94, 96 (ND Iowa, 1968).

We conclude that even though Chapter 8 of the BCA does not provide an express time limitation for the winding up of corporate affairs, a corporation must finish liquidating its business and complete the winding up process within a reasonable time.[8] This is consistent with the general rule that when a statute does not provide a specific time limit for the completion of a particular task, a reasonable time is implied. *Christian v Wayne Circuit Judge*, 219 Mich 37, 40; 188 NW 359 (1922); *Mills v Stankiewicz*, 27 Mich App 483, 489; 183 NW2d 602 (1970); see also *Smith v Michigan Basic Prop Ins Ass'n*, 441 Mich 181, 191 n 15; 490 NW2d 864 (1992). Courts in other jurisdictions have reached a similar conclusion. See *Lynch v Vincent*, 55 F Supp 44, 48 (WD Mo, 1944) (observing that although the pertinent Missouri statute did not provide a particular time limit for winding up and liquidating a dissolved corporation, "[i]n the absence of a fixed period, a reasonable time should be allowed"); *Holliday v Cornett*, 224 Ky 356, 359; 6 SW2d 497 (1928) (holding that although the relevant Kentucky statute "place[d] no limitation on the time allowed" for the winding up of a dissolved corporation, it "necessarily contemplate[d] a reasonable length of time"); see also *Doting v Trunk*, 259 Mont 343, 352; 856 P2d 536 (1993) (holding that although a Montana statute did not specify a particular time for

[8] We note that although Flint Cold Storage was incorporated under the former GCA, its dissolution and liquidation were governed by the BCA, not the former GCA. The BCA was enacted as 1972 PA 284, and took effect on January 1, 1973, more than two years before the dissolution of Flint Cold Storage. Except as otherwise provided, the provisions of the BCA govern all corporations that were in existence on the effective date of the BCA. See MCL 450.1121; MCL 450.1127(1).

winding up a partnership, "the winding up of partnership affairs should be completed within a reasonable time").

Applying this rule in the present case, we conclude that Flint Cold Storage had only a reasonable time after dissolution in which to wind up its affairs before ceasing to exist altogether. What constitutes a reasonable time is generally a question of law for the court. See *Smith*, 441 Mich at 191 n 15; *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 817; 286 NW2d 34 (1979) (stating that "[w]here the facts are undisputed the question of what is a reasonable time is a question of law"). We can scarcely, if at all, envision a case in which a 32-year winding up period might be considered reasonable. It certainly was not reasonable on the facts of this case. We are compelled to conclude that Flint Cold Storage, which dissolved in 1975, had long since completed the winding up process by the time this action was commenced more than 32 years later.

As noted previously, a dissolved corporation may continue to "sue and be sued in its corporate name . . . in the same manner as if dissolution had not occurred." MCL 450.1834(e). But once a dissolved corporation has finished winding up its affairs, its existence is terminated and it ceases to exist for all purposes. The general rule is that "after the . . . *termination of the existence of a corporation*, no action can be maintained against it, and it has no capacity to sue." 19 Am Jur 2d, Corporations, § 2489, p 567 (emphasis added). We conclude that once the existence of a dissolved corporation has terminated, it loses the powers enumerated in MCL 450.1833 and 450.1834, including the power to sue and be sued. See *BASF Corp v Central Transport, Inc*, 830 F Supp 1011, 1012-1013 (ED Mich, 1993) (observing that "[u]nder Michigan law, [a dissolved corporation] can no

longer be sued once it has completely wound up its affairs and distributed its assets"). Because plaintiff's corporate existence had terminated, it lacked the legal capacity to sue and be sued under the BCA.

Of course, even if a corporate entity has ceased to exist and lacks the general capacity to sue and be sued under state corporate law, it may nonetheless have a limited capacity to sue and be sued under another statute. 9 Fletcher Cyclopedia of the Law of Corporations, § 4266, p 45. For example, some courts have held that a terminated corporation, which has lost the legal capacity to sue and be sued under the law of the state of incorporation, may nonetheless be sued under the specific provisions of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq*. See, e.g., *Town of Oyster Bay v Occidental Chem Corp*, 987 F Supp 182, 199 (ED NY, 1997); *Traverse Bay Area Intermediate School Dist v Hitco, Inc*, 762 F Supp 1298, 1301 (WD Mich, 1991). But no such concern is present in the instant case. The statute that creates the cause of action at issue here, MCL 567.247, provides that an action to recover unclaimed property may be commenced by any "*person* who is aggrieved by a decision of the [state treasurer] or whose claim has not been acted upon within 90 days after its filing . . . ." (Emphasis added.) The UUPA defines "[p]erson" as "an individual, business association, state or other government, governmental subdivision or agency, public corporation, public authority, estate, trust, 2 or more persons having a joint or common interest, or any other legal or commercial entity." MCL 567.222(m). As is made clear by this definition, only an existing legal or commercial entity may bring suit to recover unclaimed property under MCL 567.247. Because a *terminated* corporation no longer exists for any purpose, it is not a "person" within

the meaning of the UUPA and accordingly cannot sue to recover unclaimed property pursuant to MCL 567.247. In short, MCL 567.247 provides no exception to the general rule that a terminated corporation may not sue or be sued under Michigan law.

The corporate existence of Flint Cold Storage had been terminated, and the dissolved corporation had ceased to exist for all purposes, sometime before the filing of this action. The circuit court properly determined that Flint Cold Storage lacked the legal capacity to sue. Accordingly, summary disposition was properly granted in favor of defendant pursuant to MCR 2.116(C)(5).

V

Plaintiff contends that Flint Cold Storage was the only party that could have commenced this action and that if the dissolved corporation is not allowed to proceed against defendant in its corporate name, the rightful owners of the $188,679.99 in unclaimed funds will never have the opportunity to recover the property. We do not necessarily agree.

We do acknowledge that Flint Cold Storage would have been the proper party to pursue this action if it had not yet completed the liquidation and winding up process. It is undisputed that defendant is holding the $188,679.99 in the name of Flint Cold Storage, and not in the names of any individual officers or historic shareholders. A dissolved corporation that has not yet completed winding up its affairs may continue "[c]ollecting its assets" and may continue to "sue and be sued in its corporate name . . . in the same manner as if dissolution had not occurred." MCL 450.1833(a); MCL 450.1834(e). It is well settled that a corporation and its shareholders "are different entities in the eye of the

law," *Montgomery v Central Nat'l Bank & Trust Co of Battle Creek*, 267 Mich 142, 147; 255 NW 274 (1934), even when only one individual owns all the company's stock, *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950). Consequently, the general rule is that "a suit to enforce corporate rights . . . must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). Thus, if the dissolved corporation had still been in existence as a legal entity, it would have been the proper party to maintain this suit.

As we have already concluded in part IV, plaintiff has ceased to exist and can no longer sue or be sued. But this does not necessarily foreclose the possibility that plaintiff's historic shareholders may be able to claim and successfully recover the $188,679.99 in unclaimed funds. By way of analogy, although an action under MCL 567.247 certainly could not be filed in the name of a deceased individual, the deceased individual's estate *would* be authorized to commence such an action for the purpose of recovering unclaimed property held in the deceased's name. Indeed, MCL 567.247 authorizes a "person" to maintain an action to recover unclaimed property, and MCL 567.222(m) defines the word "[p]erson" to include, among other things, an "estate[.]" Similar in some respects to the manner in which a decedent's assets pass to his or her estate upon death, a dissolved corporation's remaining assets pass to its shareholders as beneficial owners once liquidation and winding up is complete and all creditors have been satisfied. *Pontiac Trust Co v Newell*, 266 Mich 490, 497-498; 254 NW 178 (1934); see also *Bruun v Cook*, 280 Mich 484, 495; 273 NW 774 (1937). Like a decedent's estate, we perceive no reason why a terminated corporation's historic shareholders at the time of disso-

lution could not maintain an action under MCL 567.247 to recover unclaimed property held in the name of the terminated corporation. Indeed, defendant has readily admitted on several occasions that the rightful owners of the $188,679.99 are the historic shareholders of Flint Cold Storage at the time of the corporation's dissolution. Quite simply, the problem for plaintiff is not that the $188,679.99 in unclaimed funds can never be recovered, but that this action was commenced and prosecuted by the improper party.

VI

With respect to the parties' arguments concerning the doctrine of standing, we note that standing to sue and capacity to sue are two distinct concepts, which have been conflated by both plaintiff and defendant in this case. *Michigan Chiropractic Council v Comm'r of Financial & Ins Services Office*, 475 Mich 363, 374 n 25; 716 NW2d 561 (2006) (Opinion by YOUNG, J.). The termination of a corporation's existence implicates the entity's legal capacity to sue—not its standing to sue. See *Thomas Industries, Inc v Wells*, 403 Mich 466, 469; 270 NW2d 98 (1978).

VII

Flint Cold Storage had ceased to exist before the time that this suit was filed, and the terminated corporation therefore lacked the legal capacity to sue. Summary disposition was properly granted pursuant to MCR 2.116(C)(5). In light of our resolution of this issue, we need not consider the effect of plaintiff's admission that it could not "produce any documents indicating the names of the individuals who were shareholders and/or their percentage ownership at the time of dissolution of

the corporation." Nor is it necessary to consider the other arguments raised by the parties on appeal.

Affirmed. No costs pursuant to MCR 7.219, a public question having been involved.

PNC NATIONAL BANK ASSOCIATION
v DEPARTMENT OF TREASURY

Docket No. 283560. Submitted July 14, 2009, at Lansing. Decided July 23, 2009. Approved for publication September 8, 2009, at 9:10 a.m.

PNC Bank National Association paid single business taxes for three tax years under protest. It subsequently brought an action in the Court of Claims against the Department of Treasury, seeking return of the taxes paid and arguing that the department should not have included in PNC's tax base interest income from loans secured by Michigan property or made to Michigan customers because PNC received the loan payments at a mailing address outside Michigan. The court, James R. Giddings, J., granted the department summary disposition, and PNC appealed.

The Court of Appeals *held*:

Under former MCL 208.65(b)(iv) of the now-repealed Single Business Tax Act, which applied to the transactions at issue in this case, PNC's tax base in Michigan derived from its gross business in the state, which included interest it received. The statutory scheme required that gross business income of whatever kind be attributed to the state where a taxpayer engaged in the business activities that resulted in that income. PNC received interest income as a result of business activities within Michigan. Where PNC received that interest was irrelevant to the statutory scheme.

Affirmed.

Dykema Gossett PLLC (by *Steven E. Grob*, *Sherill D. Wolford*, and *Jill M. Wheaton*) for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heidi L. Johnson-Mehney*, Assistant Attorney General, for the defendant.

Before: O'CONNELL, P.J., and BANDSTRA and DONOFRIO, JJ.

PER CURIAM. This case arises from a dispute between plaintiff, PNC Bank National Association, and defendant, Michigan Department of Treasury (DOT), regarding PNC's payment under protest of more than $900,000 in taxes assessed against it for tax years 1997, 1998, and 1999. PNC appeals as of right the final order of Court of Claims denying PNC's motion for summary disposition under MCR 2.116(C)(10) and granting summary disposition to the DOT under MCR 2.116(I)(2), upholding the DOT's tax assessment against PNC. We affirm.

The parties present to us a simple issue that has been made unnecessarily complicated. PNC, a national banking association based in Pittsburgh, Pennsylvania, argues that the DOT should not have assessed the taxes for those tax years. PNC concedes that it earned interest income from loans secured by real property located in Michigan, as well as from unsecured loans provided to Michigan customers. However, PNC claims that because it received payments from these Michigan transactions at a mailing address located outside Michigan, the DOT should not have included the interest it earned on these transactions when calculating PNC's single business tax (SBT). We disagree.

The parties have conceded that former MCL 208.65 is the applicable provision for determining whether the interest payments in question should be included in PNC's tax base under the SBT, and they agree that the question is one of statutory interpretation. We review de novo both a trial court's decision to grant or deny a motion for summary disposition and questions of statutory interpretation. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (citations omitted).]

"Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002).

MCL 208.65 was repealed by 2006 PA 325, effective December 31, 2007. MCL 208.151. However, this provision was in effect during the tax years in issue. MCL 208.65 stated:

> The tax base of a financial organization attributable to Michigan sources shall be taken to be:
>
> (a) The entire tax base of a taxpayer whose business activities are confined solely to this state.
>
> (b) In the case of a taxpayer whose business activities are conducted partially within and partially without this state that portion of its tax base as its gross business in this state is to its gross business everywhere during the period covered by its return. Gross business includes the sum of:
>
> (i) Fees, commissions, or other compensation for financial services.
>
> (ii) Gross profits from trading in stocks, bonds, or other securities.
>
> (iii) Interest charged to customers for carrying debit balances of margin accounts, without deduction of any costs incurred in carrying the accounts.
>
> (iv) Interest and dividends received.

> (v) Any other gross income resulting from the operation as a financial organization.

PNC claims that MCL 208.65(b)(iv) indicated that the DOT can only include interest received by PNC in the state of Michigan when calculating PNC's tax base under the SBT. PNC argues that because it did not physically come into possession of any cash or check used as payment on a loan within the borders of the state of Michigan, it did not "receive" this interest income within the state of Michigan and, therefore, this interest income was improperly included in its tax base. To support its argument, PNC discussed the meaning of the term "received" in great detail and provided an extensive analysis of the DOT's uncertainties and contradictions in interpreting this statute in other contexts.

Yet despite PNC's determined efforts, we remain unconvinced that PNC's interpretation of MCL 208.65(b)(iv) is correct. It seems illogical that the Legislature would have intended to exempt from taxation interest income earned on loans secured by Michigan property or made to Michigan customers simply because the payments on these loans were sent to an out-of-state mailing address. PNC's interpretation of "received" would set up a perfect tax loophole: any financial institution could avoid paying taxes on interest earned from loans made to Michigan customers or secured by Michigan property simply by requiring its borrowers to mail their payment checks to a post office box in South Bend, Indiana, or Toledo, Ohio.

Further, the clear purpose of MCL 208.65 is to determine the portion of a multistate taxpayer's "business activities" that occurred "within" Michigan and "without" Michigan, i.e., in some other state. It does so by requiring a comparison of the amount of "gross

business in this state" to the amount of "gross business everywhere." "Gross business," according to the statute, includes five categories of income.

We conclude that this statutory scheme required that gross business income of whatever kind must be attributed to the state where a taxpayer engaged in the business activities that resulted in that income. We further conclude that the DOT's reading of MCL 208.65(b)(iv) fulfills this statutory scheme and purpose. Plaintiff received interest income as a result of business activities within Michigan. As a result, plaintiff must pay Michigan tax on that interest. Where plaintiff received that interest is irrelevant to the statutory scheme, and nothing in the language of the statute suggested that it must have been received in Michigan to be taxable.

Affirmed.

PEOPLE v CHOWDHURY

Docket No. 288696. Submitted August 5, 2009, at Detroit. Decided September 10, 2009, at 9:00 a.m.

Emran Chowdhury was charged in the 52-4 District Court with violating an ordinance of the city of Troy that prohibited possession of alcoholic liquor by a person who is less than 21 years of age. The ordinance further provided (1) that a peace officer who had reasonable cause to believe that the minor consumed alcoholic liquor could require the minor to submit to a preliminary chemical breath analysis (PBT) for the presence of alcohol in the minor's body, (2) that the results of the PBT could form the basis of an arrest and be admitted in a criminal prosecution for a violation of the ordinance, and (3) that a minor who refused to take a PBT was responsible for a civil infraction. The defendant moved to suppress the results of the PBT, arguing that the ordinance was unconstitutional because it allowed a warrantless search in the absence of an exception to the warrant requirement. The district court, William E. Bolle, J., ruled that the ordinance was unconstitutional and suppressed the evidence obtained from the PBT. The city sought leave to appeal in the Oakland Circuit Court. The circuit court, Rae Lee Chabot, J., denied leave to appeal, and the city sought leave to appeal in the Court of Appeals.

The Court of Appeals *held*:

1. The PBT administered to the defendant constituted a search under the Fourth Amendment. Generally, searches or seizures conducted without a warrant are unreasonable per se, and evidence seized in violation of the Fourth Amendment prohibition of unreasonable searches and seizures must be excluded. A number of exceptions to the warrant requirement exist, but those exceptions still require reasonableness and probable cause.

2. Under the governmental "special needs" (or regulatory) exception, a warrant or probable cause is not required if the search meets reasonable legislative or administrative standards. There is nothing special in the need of law enforcement to detect evidence of ordinary criminal wrongdoing, however, and reasonableness generally requires obtaining a judicial warrant if the search is to

discover evidence of criminal wrongdoing. The special needs exception did not apply to this case.

3. The exigent circumstances exception to the warrant requirement provides that the police may search without a warrant in cases of actual emergency if there are specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. No exigencies existed in this case that would have permitted a PBT search without a valid warrant. The city presented no evidence that the police officers could not have sought and obtained a warrant before dissipation of the defendant's bodily alcohol content and the consequent loss of evidence of illegal alcohol consumption. Nor did the city present evidence of any other exigent circumstances.

Affirmed.

1. CONSTITUTIONAL LAW — SEARCHES AND SEARCHES — MINORS IN POSSESSION OF ALCOHOL — PRELIMINARY BREATH TESTS.

An ordinance that authorizes a police officer to compel a minor to submit to a breath test for the presence of alcohol in the minor's body without a warrant, or in the absence of circumstances excusing the requirement of a search warrant, is unconstitutional on its face (US Const, Am IV).

2. SEARCHES AND SEIZURES — PRELIMINARY BREATH TESTS.

A preliminary chemical breath analysis for bodily alcohol content is a search within the meaning of the Fourth Amendment.

3. SEARCHES AND SEIZURES — FOURTH AMENDMENT — WARRANT REQUIREMENT — EXIGENT CIRCUMSTANCES.

The exigent circumstances exception to the search warrant requirement provides that a police officer may search without a warrant in cases of actual emergency if there are specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officer or others, or (3) prevent the escape of a suspect; the existence of exigent circumstances must be considered on a case-by-case basis.

Lori Grigg Bluhm, City Attorney, and *Allan T. Motzny*, Assistant City Attorney, for the plaintiff.

Richard A. Levitt for the defendant.

Before: STEPHENS, P.J., and JANSEN and WILDER, JJ.

PER CURIAM. Plaintiff, the city of Troy (City), appeals by leave granted the circuit court's denial of leave to appeal, which allowed to stand the district court's order striking down a City ordinance and suppressing certain evidence collected from defendant during a preliminary breath test (PBT). Having found no error in the district court's ruling or the circuit court's denial of leave to appeal, we now affirm.

I

A number of young adults under 21 years of age were allegedly drinking alcoholic beverages at a house party in the City. Police officers responded to a call and arrived to find a group of individuals leaving the party on foot. The officers detained the group of young adults, which included defendant. An officer asked each of the young adults whether he or she had been drinking alcohol. Some of the young adults indicated that they had been drinking, and others indicated that they had not. The officer divided the young adults into two smaller groups, separating those who admitted that they had been drinking from those who denied drinking at the party. The officers then proceeded to administer PBTs to the young adults. One of the officers administered a PBT to defendant, which resulted in a reading of "0.025." It is undisputed that the officer did not request defendant's consent before administering the PBT. Neither that particular officer, nor any other officer, obtained a search warrant before administering the PBTs.

The City ordinance at issue in this case, Troy Ordinance § 98.10.03, provides in relevant part:

> A person less than 21 years of age shall not purchase or attempt to purchase alcoholic liquor, consume or attempt

> to consume alcoholic liquor, or possess or attempt to possess alcoholic liquor. A person who violates this section is guilty of a misdemeanor . . . .
>
> * * *
>
> A peace officer who has reasonable cause to believe a person less than 21 years of age has consumed alcoholic liquor may require the person to submit to a preliminary chemical breath analysis. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor.

Furthermore, Troy Ordinance § 98.10.04 provides in relevant part that a "person less than 21 years of age who refuses to submit to a preliminary chemical breath analysis . . . is responsible for a civil infraction and may be ordered to pay a civil fine of not more than $100.00."

Defendant testified before the district court that the officers had indicated that he and the others were required take a PBT. According to defendant and other witnesses, the officers informed the young adults that they would be taken to the police station—and possibly go to jail—if they did not comply by submitting to the PBTs. Defendant testified that he believed that he had no choice but to submit to the PBT. Defendant and other witnesses stated that the officers had been aggressive and had used profane language toward the young adults. Defendant testified that he had felt intimidated and that he had therefore submitted to the PBT without objecting and without asking any questions of the officers.

After having been charged with violating Troy Ordinance § 98-10-03, defendant moved in the district court

to suppress the results of the PBT. Defendant argued that the ordinance was unconstitutional because it purported to allow a police officer to perform a warrantless search, because warrantless searches are generally considered unreasonable unless an exception applies, and because no exception to the warrant requirement was applicable in this case. In support of his position, defendant cited two cases in which the United States District Court for the Eastern District of Michigan had ruled that a similarly worded ordinance and a similarly worded state statute were unconstitutional. Defendant at all times maintained that the police officers had been aggressive, that he had felt compelled to comply with the officers' directions, and that he had not voluntarily submitted to the PBT.

The district court held oral argument on defendant's motion and heard the testimony of several witnesses. The district court ruled that Troy Ordinance § 98-10-03 was unconstitutional on its face, that the warrantless search of defendant's person had been unreasonable, and that no exception to the warrant requirement had been applicable on the facts of this case. Therefore, the district court suppressed the evidence collected from defendant during the PBT.[1]

The City subsequently sought leave to appeal the district court's ruling in the Oakland Circuit Court. The circuit court held no oral argument and decided the City's application for leave to appeal on the basis of the written submissions alone. In a succinct but complete opinion and order, the circuit court ob-

[1] Although the district court suppressed the evidence collected from defendant during the PBT, it did not grant defendant's motion to dismiss. The district court remarked, "I'm not going to dismiss the case yet [because] the People might be able to prove it without a PBT test, I don't know whether they can or not, but I am not going to go so far as to dismiss it yet."

served that it had surveyed the relevant caselaw and had found no decisions on point, other than the two federal cases cited by defendant before the district court. The circuit court opined that "[t]here is nothing from the appellate courts upon which to base the reversal of the district court" and that the "district court's decision was correct insofar as the ordinance is unconstitutional . . . ." Accordingly, the circuit court denied the City's application for leave to appeal the district court's ruling.

We granted leave to appeal to consider this issue of first impression for the Michigan appellate courts. *People of Troy v Chowdhury*, unpublished order of the Court of Appeals, entered March 20, 2009 (Docket No. 288696).

II

The constitutionality of an ordinance is reviewed de novo, *People v Barton*, 253 Mich App 601, 603; 659 NW2d 654 (2002), as are all other questions of constitutional law, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We will not disturb a trial court's[2] findings of fact at a suppression hearing unless they are clearly erroneous. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). However, the ultimate question whether evidence should be suppressed is an issue of law for the court. *People v Dungey*, 235 Mich 144, 146-147; 209 NW 57 (1926). "Questions of law relevant to a motion to suppress evidence are reviewed de novo." *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003).

[2] In cases such as this, wherein a district court ruling has been appealed in the circuit court, we refer to the district court as the "trial court." See MCR 7.101(A)(1).

III

We cannot conclude that the circuit court erred by denying the City's application for leave to appeal, thereby allowing to stand the district court's order striking down Troy Ordinance § 98.10.03 and suppressing the evidence collected from defendant during the PBT.

The United States District Court for the Eastern District of Michigan has already held a substantially similar Bay City ordinance and a substantially similar state statute unconstitutional. *Spencer v Bay City*, 292 F Supp 2d 932 (ED Mich, 2003); *Platte v Thomas Twp*, 504 F Supp 2d 227 (ED Mich, 2007). In the instant matter, the district court cited these two federal cases as persuasive authority, ruling that Troy Ordinance § 98.10.03 "is too broad," that "requesting someone to submit to a PBT is a search," and that the police were required to obtain a warrant before administering the PBTs unless it could be shown that one of the exceptions to the search warrant requirement applied. As discussed previously, the circuit court agreed, finding no Michigan caselaw on which to base a reversal of the district court's ruling.

A

The City argues that the federal caselaw relied on by the district and circuit courts failed to adequately address the "special needs" exception to the search warrant requirement. The City contends that the "special needs" exception should be applied in this case because there is a compelling state interest in protecting young people from the dangers of alcohol abuse and in protecting the general public from the potential consequences of alcohol abuse by young persons.

It is true, as the City points out, that we are not bound by the decisions of lower federal courts. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). However, both *Spencer* and *Platte* thoroughly discussed the issues presented in the instant case and specifically refute the City's argument that the "special needs" exception to the search warrant requirement should apply.

"Both the United States Constitution and the Michigan Constitution guarantee the right against unreasonable searches and seizures. The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment of the United States Constitution." *People v Jones*, 279 Mich App 86, 90-91; 755 NW2d 224 (2008) (citations omitted); see also US Const, Am IV; Const 1963, art 1, § 11. " 'The constitutions do not forbid all searches and seizures, only unreasonable ones. . . . The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy.' " *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005) (citation omitted).

"Ordinarily, searches or seizures conducted without a warrant are unreasonable per se. And, generally, when evidence has been seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial." *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005) (citation omitted). "There are, however, a number of recognized exceptions to the warrant requirement . . . ." *Id*. Among others, these exceptions include "exigent circumstance[s], searches incident to a lawful arrest, stop and frisk, consent, and plain view. Each of these exceptions, while not requiring a warrant, still

requires reasonableness and probable cause." *People v Brzezinski*, 243 Mich App 431, 433-434; 622 NW2d 528 (2000) (citation omitted). In addition, under "the governmental 'special needs' or regulatory exception," a "warrant or probable cause will not be required . . . as long as the searches meet 'reasonable legislative or administrative standards.' " *People v Woods*, 211 Mich App 314, 317; 535 NW2d 259 (1995), quoting *Griffin v Wisconsin*, 483 US 868, 873; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

In *Spencer*, 292 F Supp 2d at 935, the federal district court considered a Bay City ordinance that provided:

> A peace officer who has reasonable cause to believe a person less than 21 years of age has consumed alcoholic liquor may require the person to submit to a preliminary chemical breath test analysis. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol tests are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor. A person less than 21 years of age who refuses to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $ 100.00.

Bay City defended its ordinance against a claim that it violated the Fourth Amendment by asserting "that the so-called 'special needs' exception excuses the requirement for a search warrant, and the searches are reasonable because they are based on reasonable suspicion." *Id*. at 939. The *Spencer* court disagreed, concluding that

> [t]here is nothing "special" in the need of law enforcement to detect evidence of ordinary criminal wrongdoing; even where crime is on the rise and the disorder and insecurity

> caused by criminal behavior in a community is grave, the Supreme Court has consistently held that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *City of Indianapolis v. Edmond*, 531 U.S. 32, 42, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, th[e Supreme] Court has said that reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist* [*47J v Acton*], 515 U.S. [646, 653], 115 S.Ct. 2386 [132 L Ed 2d 564 (1995)]. [*Spencer*, 292 F Supp 2d at 941.]

Moreover, as the *Spencer* court explained, the "Supreme Court made clear . . . that laudable, non-criminal purposes of a law authorizing warrantless searches will not exempt the practice from the traditional mandate of a warrant issued upon probable cause when an objective to gather evidence also exists." *Id.* at 942; see also *Ferguson v City of Charleston*, 532 US 67; 121 S Ct 1281; 149 L Ed 2d 205 (2001). The *Spencer* court concluded that "Bay City's ordinance cannot be justified under the 'special needs' exception to the requirement that a search of a person, including a search and seizure of breath samples, must be authorized by a judicial officer through the search warrant process." *Spencer*, 292 F Supp 2d at 942.

Bay City had also argued that "the warrantless searches called for by the ordinance are justified by exigent circumstances, due to the length of time required in Bay City to obtain a search warrant for breath samples." *Id.* at 939. However, the *Spencer* court found that exigent circumstances must be considered on a case-by-case basis because the "time necessary to obtain a warrant in cases that fall within the scope of the ordinance does not create an exigency as a matter of legislative fact, nor does it serve to establish an automatic exemption from the warrant requirement." *Id.* at 944.

In *Platte*, 504 F Supp 2d at 230-231, the federal district court considered MCL 436.1703(6), which provides:

> A peace officer who has reasonable cause to believe a minor has consumed alcoholic liquor or has any bodily alcohol content may require the person to submit to a preliminary chemical breath analysis. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor or had any bodily alcohol content. A minor who refuses to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100.00.

In *Platte*, several plaintiffs brought claims under 42 USC 1983 against Thomas Township and other municipalities, as well as the Governor of Michigan and the director of the Michigan State Police, arguing that MCL 436.1703(6) was "unconstitutional insofar as it authorized police officers to compel minors to submit to breath tests for alcohol in the absence of a warrant or circumstances excusing the requirement of a search warrant." *Platte*, 504 F Supp 2d at 230. In response, the defendants argued, as does the City in the case at bar, "that the statute is constitutional on its face because warrantless searches pursuant thereto can be justified on the basis of exigent circumstances and special needs." *Id*. at 231.

Relying on *Spencer* and *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 616-617; 109 S Ct 1402; 103 L Ed 2d 639 (1989), the *Platte* court observed that " '[i]t is well established that the taking of a breath sample to test for the presence of alcohol constitutes a

search under the Fourth Amendment. As such, the search must be reasonable.' " *Platte*, 504 F Supp 2d at 236 (citations omitted). Regarding the plaintiffs' facial challenge to MCL 436.1703(6), the *Platte* court explained that "the text and context of the statute must be examined to determine if it can be construed in such a way that an unconstitutional interpretation can be avoided, or, on the other hand, whether the statute's plain language authorizes unconstitutional conduct on the part of the government." *Id*. at 238.

The *Platte* court went on to observe that MCL 436.1703(6)

> plainly does not require the police officer to obtain a warrant before taking a breath sample from a minor . . . . There is no dispute that there is a preference expressed in the Fourth Amendment that searches, to be reasonable, be sanctioned by the issuance of a warrant by a neutral and detached judicial officer. Nor does the statute require that any of the recognized exceptions to the warrant requirement exist before the police officer compels a minor to submit to a breath test. [*Id.* (citation omitted).]

Although the defendants in *Platte* argued that the "exigent circumstances" exception to the search warrant requirement should apply, as did Bay City in *Spencer*, the *Platte* court explained that

> to say that there are some circumstances under which breath samples can be taken from minors in a constitutional way *does little to answer the question whether the statute itself is constitutional*, when the statute allows searches and seizures absent the condition of a warrant or an excuse for proceeding without one. [*Id.* (emphasis added).]

One of the defendants in *Platte* contended that "exigent circumstances always exist as a matter of law because search warrants cannot be obtained before a teenager's blood alcohol content dissipates. There-

fore, . . . the statute is valid and the procedures employed by [the] officers thereunder are constitutional." *Id*. at 241. Again, the court rejected the "exigent circumstances" argument, explaining that it

> ignores the general rule that in the criminal context, warrantless searches are presumptively unreasonable; the government bears the burden of establishing an exception to the warrant requirement in the case at hand; the resulting reasonableness *vel non* of the search must turn on the facts of each case; and blanket exceptions to the warrant requirement are disfavored. [*Id*. at 241-242 (citations omitted).]

The *Platte* court concluded that the defendant in question had "not demonstrated that [MCL] 436.1703(6) can survive constitutional challenge by means of a blanket exigent circumstances exception to the Warrant Clause of the Fourth Amendment . . . ." *Id*. at 245.

With respect to the defendants' "special needs" argument, the *Platte* court stated that the "Supreme Court has held that some searches can be reasonable absent both a warrant and exigent circumstances, specifically 'when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." ' " *Id*. at 238 (citations omitted). Referring to the decision in *Spencer*, 292 F Supp 2d at 939-941, the *Platte* court observed, "It is enough to note that the weight of authority relegates the 'special needs' exception to non-criminal governmental activity." *Platte*, 504 F Supp at 239. The court concluded that MCL 436.1703(6) " 'endorses procedures to authorize a search that clearly do not comport with the Fourth Amendment' " and therefore that the statute "is unconstitutional on its face." *Id*. (citation omitted).[3]

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[3] The *Platte* court was "not prepared to conclude as a matter of law that the offense of minor in possession of alcohol is so insignificant a

The decisions in *Spencer* and *Platte* are both well reasoned and consistent with existing Fourth Amendment law. Accordingly, we find *Spencer* and *Platte* to be persuasive, see *Abela*, 469 Mich at 607, and conclude that Troy Ordinance § 98.10.03 is unconstitutional on its face. Moreover, we agree with the *Spencer* court that "[t]here is nothing 'special' in the need of law enforcement to detect evidence of ordinary criminal wrongdoing" and that " 'reasonableness generally requires the obtaining of a judicial warrant.' " *Spencer*, 292 F Supp 2d at 941 (citation omitted). The "special needs" exception to the search warrant requirement is quite simply not applicable on the facts of this case. See *id*. at 941-942.

B

The City argues that even if Troy Ordinance § 98.10.03 is unconstitutional on its face, the district and circuit court decisions should still be reversed because defendant's Fourth Amendment rights were not violated. Specifically, the City argues that the PBT did not constitute a search within the meaning of the Fourth Amendment and that when the police asked defendant to submit to the PBT, he consented. In addition, the City contends that even if the PBT was a search, the likely dissipation of defendant's bodily alcohol content was an exigency that justified the warrantless search in this case.

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transgression that warrantless searches can never be conducted to gather evidence of this crime. If officers must act so quickly to prevent the immediate destruction of evidence that they cannot obtain a search warrant within the time it would reasonably take to procure one, then administration of a PBT without a warrant may be consistent with the Fourth Amendment . . . ." [*Platte*, 504 F Supp at 246 (emphasis deleted).]

The *Platte* court noted that, on the specific facts of that case, there remained "fact questions on the material issue of whether exigent circumstances existed." *Id*.

As an initial matter, we disagree with the City's contention that because a PBT is different and less intrusive than a Breathalyzer test, it is not a search for purposes of the Fourth Amendment. "A search within the meaning of the Fourth Amendment 'occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.' " *Jones*, 279 Mich App at 91, quoting *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). "Because the Fourth Amendment protects people, as opposed to places or areas, . . . a search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). "Indeed, what an individual ' "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." ' " *Id.*, quoting *People v Clark*, 133 Mich App 619, 625; 350 NW2d 754 (1983), in turn quoting *Katz v United States*, 389 US 347, 351-352; 88 S Ct 507; 19 L Ed 2d 576 (1967).

As discussed previously, the *Spencer* court held that a PBT was a search under the Fourth Amendment: "It is well established that the taking of a breath sample to test for the presence of alcohol constitutes a search under the Fourth Amendment. As such, the search must be reasonable." *Spencer*, 292 F Supp 2d at 939. Other courts have also held that breath tests constitute searches for Fourth Amendment purposes. See, e.g., *State v McGuigan*, 184 Vt 441, 447-448; 965 A2d 511 (2008); *Milwaukee Co v Proegler*, 95 Wis 2d 614, 623; 291 NW2d 608 (Wis App, 1980). Indeed, the United States Supreme Court has held that although breath and urine tests for alcohol may be less intrusive than blood tests,[4] they nonetheless rise to the

[4] It is true, as the City notes, that the United States Supreme Court in *Skinner* found breath tests to be less intrusive than blood tests. *Skinner*,

level of searches within the meaning of the Fourth Amendment. *Skinner*, 489 US at 616-617. On the basis of this authority, we have no difficulty concluding that the PBT administered to defendant in this case constituted a search under the Fourth Amendment.

Nor can we agree with the City's argument that defendant consented to the PBT and that a search warrant was consequently not required. "To validate an otherwise unreasonable search or seizure, . . . consent must be unequivocal, specific, and freely and intelligently given." *Dagwan*, 269 Mich App at 342. "Consent [to search] is not voluntary if it is the result of coercion or duress." *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004).

" 'When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.' " *Farrow*, 461 Mich at 208 (citation omitted).

> [K]nowledge of the right to refuse consent is not a prerequisite to effective consent. Rather, knowledge of the right to refuse is but one factor to consider in determining whether consent was voluntary under the totality of the circumstances. However, . . . the people need not prove that the person giving consent knew of the right to withhold consent. [*People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999) (citations omitted).]

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489 US at 625-626. But this conclusion was in the context of a broader holding that chemical tests administered to railroad employees for safety reasons—and *not* for the purpose of ordinary crime detection—met the "special needs" exception to the search warrant requirement. See *id.* at 633-634. As discussed previously, the "special needs" exception is inapplicable to law enforcement's desire to detect evidence of ordinary criminal wrongdoing, such as in the case at bar. *Spencer*, 292 F Supp 2d at 941.

In the case at bar, the district court did not address the issue of consent, which generally presents a question of fact and normally involves credibility determinations. Nonetheless, it is clear from the record that defendant was never asked for his consent. Although there was conflicting testimony regarding which officer administered certain of the PBTs in this case, both officers testified that they did not ask defendant and the other young adults for their consent. Defendant testified, as did the others, that he had not consented to the PBT and that he had felt as though he had no choice in the matter. Indeed, defendant testified that he believed that he would go to jail if he refused to submit to the PBT.[5] Defendant also testified that one officer "was really aggressive and intimidating. I didn't want to say anything to tick him off." Even one of the officers admitted that he was "pretty sure it was implied [that the young adults] were not able to leave until I finished the investigation."

The record plainly establishes that defendant was never asked for his consent and did not give his consent at any time. The City does not cite any caselaw to suggest that a mere failure to object to a proposed search constitutes actual consent. Nor could the City do so, as no such authority exists. Indeed, as noted earlier, the prosecution bears the burden of proving that consent to search was freely and voluntarily given. *Farrow*, 461 Mich at 208. " 'This burden cannot be discharged

[5] According to the testimony of certain witnesses, one of the officers had stated that anyone who refused to take the PBT would go to jail. Other witnesses testified somewhat differently. However, even these other witnesses testified that the officer had told them that if they refused to take the PBT, he would "take us to the station" or to "the police station." One witness testified that although he could not recall the exact words used by the officer, he had assumed that he would go to jail if he refused to take the PBT.

by showing no more than acquiescence to a claim of lawful authority.' " *Id*. (citation omitted). Defendant did not consent to the police officers' administration of the PBT in this case.

Lastly, we disagree with the City's argument that there were exigent circumstances that precluded the need for a search warrant in the present case. The City asserts that because the Troy police were dealing with a group of several young adults, it would have taken too long to secure search warrants authorizing the administration of a PBT to each of the minors. Specifically, the City asserts that during the time it would have taken to obtain search warrants, the minors' bodily alcohol content would have dissipated and any evidence of illegal alcohol consumption would have been lost.

The existence of exigent circumstances must be considered on a case-by-case basis. The "exigent circumstances" exception to the search warrant requirement provides that the police may search without a warrant in cases of " 'actual emergency' " if there are " 'specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect.' " *People v Beuschlein*, 245 Mich App 744, 749-750; 630 NW2d 921 (2001) (citation omitted).

As in *Platte*, we perceive no exigencies in the case at bar that would have permitted a PBT search without a valid search warrant. Similar to the City's argument in this case, one of the defendants in *Platte* complained of "the rapid rate of dissipation of alcohol in the bloodstream compared to the time it takes its police officers to obtain a search warrant." *Platte*, 504 F Supp 2d at 242. The *Platte* court found that the "record in this case . . . fails to establish that the evidence sought

'would probably be destroyed within the time necessary to obtain a search warrant' when measured against the time the . . . police officers loitered at the scene in this case." *Id*. (emphasis deleted; citation omitted). Moreover, while one of the police officers in *Platte* testified that "a search warrant could be obtained . . . in an hour and fifteen minutes," an expert witness testified that "alcohol would not dissipate from the average male's blood until two hours and twenty minutes after consumption ceases; for an average female, dissipation would not occur until three hours after consumption." *Id*. at 243. The *Platte* court concluded that "the record in this case establishes that the . . . police officers had time to request a search warrant to take breath samples from [the defendants]." *Id*.

In the instant case, the City presented no evidence at the district court suppression hearing to establish that the police officers could not have sought and obtained search warrants before dissipation of the minors' bodily alcohol content. Nor did the City present evidence of any other exigent circumstances. In short, the City failed to substantiate its claim that "it would have taken a long time to secure search warrants specifically authorizing the administration of a PBT" to each of the young adults. The district court did not clearly err by declining to find the existence of exigent circumstances in this case. See *Farrow*, 461 Mich at 209. No exigent circumstances having been established, we conclude that the police were required to procure a valid search warrant before administering the PBT to defendant.

C

The PBT administered to defendant in this case constituted a search within the meaning of the Fourth Amendment, to which defendant did not consent. None

of the exceptions to the search warrant requirement applied, and the police officers were accordingly required to seek and obtain a valid search warrant before administering the PBT to defendant. The district court did not err by ruling that Troy Ordinance § 98.10.03 is unconstitutional on its face or by suppressing the evidence collected from defendant during the warrantless PBT search. Nor did the circuit court err by denying the City's application for leave to appeal.

Affirmed.

SMITH v MEEMIC INSURANCE COMPANY

Docket No. 286140. Submitted August 11, 2009, at Lansing. Decided September 10, 2009, at 9:05 a.m.

Annie Smith was injured in an automobile accident in which it appeared that the other driver, Victoriano Gonzales, was uninsured. Smith notified MEEMIC Insurance Company, her insurer, claiming uninsured motorist benefits. Smith filed an action in the Oakland Circuit Court against Gonzales and sent a letter to MEEMIC, informing it that she was proceeding toward obtaining a default judgment against Gonzales and indicating that she was interested in settling her uninsured motorist's claim with MEEMIC. MEEMIC did not respond to the letter. The court, Wendy Potts, J., entered a default judgment against Gonzales. Having received no response from MEEMIC, Smith filed an action against MEEMIC in the same court, seeking uninsured motorists benefits. MEEMIC filed a motion for summary disposition, arguing that under the "no settlement or no judgment" clause of the policy, coverage was excluded because Smith had obtained the default judgment against Gonzales without MEEMIC's consent. Judge Potts set aside the default judgment against Gonzales before MEEMIC's motion for summary disposition was heard. In the action against MEEMIC, the court, Michael Warren, J., granted MEEMIC's motion for summary disposition, concluding that the moment Smith obtained the default judgment against Gonzales she was in breach of the insurance contract and, because the contract included no remedial provision for retroactively undoing the violation, the breach was fixed at the moment it was committed. Smith appealed.

The Court of Appeals *held*:

Once the default judgment was set aside, MEEMIC was not entitled to summary disposition. Judgments that are set aside are nullities. In addition, the policy is written in the present tense and, therefore, once the default judgment was set aside, the case against Gonzales was no longer currently settled or prosecuted to a judgment, making the provision inapplicable. The order granting summary disposition must be reversed and the case must be remanded to the trial court for further proceedings.

Reversed and remanded.

INSURANCE — AUTOMOBILES — UNINSURED MOTORIST BENEFITS — EXCLUSIONS FROM UNINSURED MOTORIST COVERAGE — JUDGMENTS — SETTLEMENTS.

An automobile insurance policy exclusion excluding uninsured motorist coverage for bodily injury sustained by the insured if an action against the uninsured motorist is settled or prosecuted to judgment without the knowledge and consent of the insurer does not apply where a default judgment or settlement received by the insured for the insured's injury has been set aside.

Keller & Avadenka, P.C. (by *Barry F. Keller* and *Ann Marie Pervan*), for the plaintiff.

Galbraith, Gordon & Penzien, P.C. (by *Steven B. Galbraith* and *Jeffrey E. Penzien*), for the defendant.

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

SHAPIRO, J. In this case involving the uninsured motorist provisions of an automobile insurance policy sold by defendant to plaintiff, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The facts in this case are undisputed. Plaintiff was injured in an automobile accident in which it appeared that the other driver, Victoriano Gonzales, was uninsured. Plaintiff notified defendant and claimed uninsured motorist benefits. She filed suit against Gonzales and sent defendant a letter, informing it that she was proceeding toward obtaining a default judgment against Gonzales. The letter also indicated that plaintiff would be interested in settling her uninsured motorist's claim with defendant. Defendant did not respond to the letter.

Plaintiff subsequently perfected a default judgment against Gonzales in the amount of $50,000. Having received no response from defendant concerning settlement or arbitration of her uninsured motorist claim, plaintiff filed the instant suit. However, it was assigned to a different judge than the one who had entered the default judgment against Gonzales. Defendant moved for summary disposition, arguing that the "no settlement/no judgment" clause of the insurance policy excluded uninsured motorist coverage because plaintiff had obtained a default judgment against Gonzales without defendant's consent.

After the summary disposition motion was filed, but before it was heard, the default judgment against Gonzales was set aside. Plaintiff argued in the trial court that defendant's motion for summary disposition should be denied because she was not presently in violation of the contract. Plaintiff further argued that by failing to respond for nearly two years to plaintiff's request for arbitration of the uninsured motorist claim, defendant waived its right to assert such a defense. The trial court rejected these arguments and concluded that the moment plaintiff obtained the default judgment, she was in breach of the contract and because the contract included no remedial provision for retroactively undoing the violation, plaintiff's breach was fixed at the time it was committed. Plaintiff now appeals.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Issues of contract interpretation are questions of law, also reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

The policy provision at issue reads:

> EXCLUSIONS
>
> 1. This coverage does not apply to bodily injury sustained by an insured person:
>
> * * *
>
> E. if the resulting cause of action is settled or prosecuted to judgment without our knowledge and consent[.] [Emphasis omitted.]

Defendant argues that *Lee v Auto-Owners Ins Co* (*On Second Remand*), 218 Mich App 672; 554 NW2d 610 (1996), and *Linebaugh v Farm Bureau Mut Ins Co*, 224 Mich App 494; 569 NW2d 648 (1997), hold that a default judgment entered against an uninsured motorist triggers the exclusionary clause even if there is no prejudice to the insurer. However, neither of these cases involved the judgment against the uninsured motorist being set aside. Rather, each case involved a *refusal* to set aside the judgment and a demand for arbitration notwithstanding that fact. Because these cases do not address the specific issue in this case, we find that they are inapplicable. Instead, we look to caselaw addressing the legal ramifications of a default judgment that has been set aside and conclude that once the default judgment was set aside, defendant was not entitled to summary disposition.

It is well settled that judgments that have been set aside are nullities. See, e.g., *Jones v O'Donnell*, 292 Mich 189, 193; 290 NW 375 (1940) (judgments that had been set aside "became nullities"); *Denison v Crowley, Milner & Co*, 279 Mich 211, 215; 271 NW 735 (1937) ("If the judgment is vacated it does not operate as an adjudication of liability on the part of defendant, nor may it, or the compromise agreement, be considered at all upon that question."); *Comm'r of Hwys of Hope Twp v Ludwick*, 151 Mich 498, 501; 115 NW 419 (1908);

People v Dane, 81 Mich 36, 39; 45 NW 655 (1890) (judgment that is set aside is " 'held for naught' ") (citation omitted); *Van Renselaer v Whiting*, 12 Mich 449, 451 (1864) ("The effect of vacating the judgment as to [one defendant] was to vacate it as to the other defendant also; and *there is now no judgment in the case*.") (emphasis added). As Justice CHRISTIANCY summarized in *People ex rel Gilman v Wayne Circuit Court Judge*, 21 Mich 372, 373 (1870) ("[B]eing reversed, the case stands the same *as if no such judgment had ever been rendered*.") (emphasis added). Thus, when the default judgment against Gonzales was set aside, it was "the same as if no such judgment had ever been rendered," *id.*, and without a judgment against Gonzales, the exclusionary clause of the insurance policy was no longer applicable.

Moreover, even if we assume that the language of a policy provision could overcome the nullifying effect of a court's decision to set aside a judgment, we find that the provision at issue does not do so because it is written in the present tense. The policy provision provides that coverage is precluded if the case "*is* settled or prosecuted to judgment," (emphasis added) not if it "was once" or "has been at some point" prosecuted to judgment. Thus, once the default judgment was set aside, the case was no longer currently settled or prosecuted to judgment, making the provision inapplicable.

Finally, we conclude that our holding leaves intact the public policy reasons behind the exclusionary provisions found in insurance policies, such as the one at issue in this case. As this Court explained in *Lee*, *supra* at 676, "[A]n insured's release of a potentially liable tortfeasor is prejudicial to the insurer because such a release destroys any possibility that the insurer could

recoup through its right to subrogation some of the amounts paid." Because the setting aside of a default judgment renders that judgment a nullity, insurers in such cases have regained their subrogation rights, so that there is no destruction of the insurer's ability to recoup funds it has paid.

Accordingly, we hold that where an insurance policy contains an exclusionary provision that is triggered upon a settlement or judgment without the knowledge and consent of the insurer, if the default judgment or settlement is set aside such that an insurer retains its right of subrogation, the exclusion does not apply.[1]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[1] Because we reverse the trial court on this basis, we do not reach plaintiff's additional argument that defendant's course of conduct amounted to a waiver of this defense. We are, however, troubled by the fact that defendant appears to have ignored plaintiff's inquiries and displayed a willingness, if not a strategy, to remain silent as it observed plaintiff take actions that defendant knew it could later rely on to deny the claim.

PEOPLE v MESIK (ON RECONSIDERATION)

Docket No. 282088. Submitted August 25, 2009, at Lansing. Decided September 10, 2009, at 9:10 a.m.

Eddie A. Mesik was convicted by a jury in the Iron Circuit Court, C. Joseph Schwedler, J., of first-degree felony murder and armed robbery. The armed robbery conviction was vacated and the defendant was sentenced to life in prison without parole. The defendant appealed. The Court of Appeals, WHITBECK, P.J., and DAVIS and GLEICHER, JJ., affirmed in a unpublished opinion per curiam, issued July 23, 2009 (Docket No. 282088). The defendant brought a motion for reconsideration, alleging that the Court of Appeals neglected to consider arguments that the defendant raised in a supplemental brief filed *in propria persona*. The Court of Appeals granted the motion and vacated its prior opinion.

On reconsideration, the Court of Appeals *held*:

1. The defendant was not deprived of his constitutional right to present a defense when the trial court ruled that the jury could consider the fact that a witness received a letter from a friend of the defendant while both the witness and the friend were in jail but the jury could not consider the contents of the letter. The defendant had ample opportunity through other testimony and evidence to challenge the witness's credibility and alleged bias against the defendant, and the statement in the letter that the defendant sought to focus on was little more than a cumulative detail with minimal probative value.

2. Although the prosecution engaged in highly improper and misleading questioning of the defendant during cross-examination, hearsay and double hearsay statements were not introduced into evidence during the process. The jury was properly instructed that the questions did not constitute evidence.

3. The trial court properly instructed the jury regarding the presumption of innocence.

4. The defendant was not denied the effective assistance of counsel. Counsel had no obligation to raise an objection that lacked merit, the defendant failed to establish a reasonable probability that the result would have been different if his counsel had

objected to the prosecution's mischaracterization of a witness's prior testimony, and any error in the prosecutor's description of the presumption of innocence was cured by the court's jury instructions.

5. Photographs of the victim's body were properly admitted as evidence regarding the element of intent.

6. The term "murder" has been settled in the law and in common parlance for centuries. No ambiguity exists regarding the meaning of the word "murder" or what conduct is likely to expose a person to criminal liability for murder. The first-degree murder statute is not unconstitutionally vague for failing to define the word "murder."

Affirmed.

CRIMINAL LAW — CONSTITUTIONAL LAW — WORDS AND PHRASES — MURDER.

A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words; the term "murder" has been settled in the law and in common parlance for centuries; a reasonable person does not have to guess at the meaning of the word "murder" or what conduct is likely to expose the person to criminal liability therefor; the failure of the first-degree murder statute to define the word "murder" does not render the statute unconstitutionally vague (MCL 750.316).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, *Melissa Powell-Weston*, Prosecuting Attorney, and *Mark G. Sands*, Assistant Attorney General, for the people.

State Appellate Defender (by *Michael L. Mittlestat*).

Eddie A Mesik, *in propria persona*.

ON RECONSIDERATION

Before: WHITBECK, P.J., and DAVIS and GLEICHER, JJ.

DAVIS, J. Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. The armed robbery

conviction was vacated, and defendant was sentenced to life in prison without parole. Defendant appeals as of right, and we affirm.[1]

On November 13, 2006, the body of Darrell McDonald was discovered in his apartment. McDonald's wrists had been bound with brown extension cords and tied to his ankles with black coaxial cable, and a sock had been stuffed in his mouth. McDonald had suffered a total of 32 stab wounds to his chest and abdomen, numerous cuts on his hands, and three incised wounds to the neck. McDonald had last been seen at the apartment of one of his friends where there were several other people, including defendant and his friend Bradley Starnes.

Defendant first argues that the trial court erred by excluding the contents of a letter from Starnes to witness Kyle Remer. Defense counsel asked Remer on cross-examination about the contents of a letter he received from Starnes while both were in jail. Defendant was specifically interested in a single statement in the letter, in which Starnes told Remer, "Hey, do whatever it takes to get yourself out of trouble." The prosecution objected, and the trial court ruled that the jury could consider the fact that Remer received the letter but not the contents. Defendant argues that the trial court's decision to exclude the contents of the letter deprived him of the right to present a defense. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Whether

[1] Our original unpublished opinion per curiam in this case neglected to consider the arguments raised in defendant's supplemental brief on appeal that he filed *in propria persona*. This opinion corrects that omission. We have vacated our prior opinion in an unpublished order, entered September 10, 2009 (Docket No. 282088).

a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question that this Court reviews de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

We conclude that defendant was not deprived of his constitutional right to present a defense. He had ample opportunity through other testimony and evidence to challenge Remer's credibility and alleged bias against defendant. Defendant was able to show that Remer and Starnes shared a longstanding friendship, that they corresponded during Starnes's incarceration, and that Remer had a motive to protect Starnes. The single statement in the letter upon which defendant focuses was little more than a cumulative detail. Furthermore, its probative value was minimal in context: the next three sentences in the letter were, "I don't care if you have to go against me. Like I said, do whatever it takes. It's your life on the line." The trial court's exclusion of the contents of the letter did not in any way impair defendant's right to present a defense, and thus, even if we presume that the exclusion was erroneous, it was harmless. See *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Defendant next argues that the prosecutor improperly introduced hearsay and double hearsay statements. Because this claim of error was not raised below, we review it for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Hearsay is inadmissible unless a recognized exception applies. MRE 802. Where multiple levels of hearsay are involved, all declarations made must not be hearsay or must fall within a recognized exception. MRE 805. After reviewing the portion of the record of which defendant complains, we find highly improper and misleading questioning by the prosecutor during the cross-examination of defendant, but no actual hearsay.

The first improper questioning was as follows:

Q. But Mr. Remer simply got it wrong when he said to this jury in this courtroom and at a preliminary exam at another hearing under oath that you said we killed him? He's mistaken about that?

A. I would say so, yes.

* * *

Q. He also talked about, Mr. Remer talked about, his private conversation with Mr. Starnes at the preliminary exam didn't he? Where he had a one-on-one conversation with Mr. Starnes that you were there for, correct?

A. I don't recall that.

Q. Do you remember the testimony [at the preliminary examination]? If he testified to it or are we making it up? The fact of what he said in court.

A. I don't remember that exactly.

Q. You don't remember the point where Kyle Remer testified in District Court saying I spoke with Bradley Starnes. He told me that they killed him. You don't remember when he testified to that at the preliminary exam and your attorney was objecting saying you can't use this against Mr. Mesik and there was a slight back and forth and the judge said no we'll only use this against Mr. Starnes. Do you remember that part?

A. I'm not sure.

Q. Mr. Remer is testifying against Mr. Starnes. And he testified against Mr. Starnes. Hasn't he?

A. I'm, yes, I guess so.

Q. He's testified that Mr. Starnes has actually taken credit for this killing saying we killed him. Put himself in jeopardy. This is what Mr. Remer has testified to, correct?

A. I'll say again I don't exactly recall.

Q. It's in the transcript. Will you take my word for it?

A. If it's in—

Q. Do you want to see it?

A. I guess I could see it, yes.

The transcript was never actually provided. In fact, during oral argument before this Court, the prosecutor conceded that Remer did not actually make several of the statements that the prosecutor had attributed to him, including "I spoke with Bradley Starnes. He told me that they killed him." The prosecutor's questioning was therefore misleading and, in our view, improper.[2]

However, there is no hearsay in any of the above questioning. Regarding the first question, Remer had already testified at defendant's trial, where he stated that defendant and Starnes told Remer "that they killed Red."[3] Remer had also already testified at trial that he had said at the preliminary examination that defendant told him that they killed McDonald. The prosecutor's first question was therefore no more than a summary of a prior witness's testimony at trial. Furthermore, the purpose of the question was apparently to challenge defendant's position that Remer was biased in favor of Starnes and against defendant, rather than to prove that, in fact, defendant had killed McDonald. Because the challenged statement was not offered for the truth of its contents, it is not hearsay. MRE 801(c). Statements against penal interest are also not hearsay. MRE 801(d); MRE 804(b).

The remaining challenged questions are also not hearsay because they are not even evidence. Had defendant confirmed, as a witness from the stand, any of the assertions by the prosecutor, those confirmations would

[2] However the mischaracterization of the testimony occurred, we note that at the time of the rulings complained of, the trial judge would not have known that the misrepresentations were inaccurate.

[3] "Red" was McDonald's nickname.

have constituted evidence. But defendant only denied any recollection of the matters about which he was asked. Although the prosecutor's questions were, as noted, misleading and improper, the prosecutor's questions are not evidence and therefore cannot be hearsay. The trial court properly instructed the jury that "evidence includes only the sworn testimony of witnesses and the exhibits admitted into evidence" and, among other things, "the lawyers' questions to witnesses are not evidence" and should be considered "only as they give meaning to the witnesses' answers." Because there is no evidence from which we can conclude that the jury was unable to follow its instructions, the trial court's instructions cured any prejudice. See *Callon*, *supra* at 330-331.

In sum, although the questioning was improper, it did not constitute hearsay, and defendant has not shown plain error affecting substantial rights.

Defendant next argues that he is entitled to reversal because of prosecutorial misconduct. We disagree. We also review this unpreserved claim for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant first argues that the prosecutor's introduction of hearsay and double hearsay statements, discussed above, constituted prosecutorial misconduct. As noted, however, the questioning was not hearsay, and the jury was properly instructed to disregard the attorneys' questions as constituting evidence.

Defendant also argues that the prosecutor engaged in misconduct because he misrepresented Remer's preliminary examination testimony. Specifically, he chal-

lenges the prosecutor's representation to defendant on cross-examination that Remer had testified regarding a private conversation with Starnes in which Starnes admitted that he and defendant killed McDonald. Defendant is correct that the prosecutor did ask him about this alleged testimony, and he is also correct that Remer did not testify at the preliminary examination regarding such a conversation. However, defendant consistently responded that he did not recall that Remer had so testified. Under these circumstances, defendant cannot establish the requisite level of prejudice under the plain error rule.

Defendant also argues that the misrepresentation of Starnes's testimony was reiterated during the prosecutor's closing arguments. However, the passage of the closing arguments cited by defendant includes references to what Remer stated that defendant admitted, not Starnes.

Finally, defendant argues that the prosecutor's statements during closing arguments related to the presumption of innocence denied him a fair trial. Regardless of how the prosecutor described the burden of proof, the trial court properly instructed the jury regarding the presumption of innocence and clearly stated that the jury must take the law as given by the court. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant next argues that he is entitled to a new trial because he was denied effective assistance of counsel. We disagree. Our review of this unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to

prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first argues that counsel was ineffective for failing to raise a hearsay objection to the prosecutor's reference to Remer's preliminary examination testimony during cross-examination of defendant. As discussed above, the cited testimony was properly admitted. Defense counsel has no obligation to raise a meritless motion or make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Defendant also argues that counsel was ineffective for failing to object to the prosecutor's mischaracterization of Remer's preliminary examination testimony during closing arguments. As noted earlier, while the questioning did mischaracterize the prior testimony, defendant's denials remained unchallenged by extrinsic evidence. Therefore, this argument fails because defendant has not established that there is a reasonable probability that the result of the proceedings would have been different had his counsel objected. *Rodgers*, *supra* at 714. Finally, defendant argues that he was denied effective assistance of counsel for failure to object to the prosecutor's description of the presumption of innocence. Again, any error was effectively cured by the court's jury charge.

Next, we reject defendant's argument that the trial court erred by allowing the introduction of photographs of the victim's body at the crime scene. A trial court's decision to admit photographs into evidence is reviewed for an abuse of discretion. *Aldrich*, *supra* at 113. Evidence is unfairly prejudicial if it presents a danger that the jury would give undue or preemptive weight to marginally probative evidence. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002). While gruesome photographs should not be admitted solely to garner sympathy from the jury, a photograph that is admissible for some other purpose is not rendered inadmissible because of its gruesome details. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998).

Defendant argues that the photographs were not necessary because the manner of death was not disputed at trial and instead the main dispute involved the number and identity of the murderers. However, the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Therefore, while defendant did not contest McDonald's cause of death, the prosecution was not relieved of its duty to prove all the elements of first-degree murder, including intent. The photographs were helpful to meet this burden.

Finally, defendant argues *in propria persona* that MCL 750.316, Michigan's first-degree murder statute, is unconstitutional because the term "murder" is not defined by statute. He argues that the statute fails to advise defendants of the nature of the charge against them, is impermissibly vague, and is therefore void as being facially unconstitutional. While it is true that the word "murder" is not defined by statute, and in Michi-

gan never *has* been defined by statute, see *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), no such definition is required. We find nothing vague about what conduct is prohibited by the statute.

The constitution requires criminal statutes to give "fair warning" to defendants of what conduct will constitute a crime without resorting to speculation, and they must provide adequate guidance to the trier of fact without requiring a court to "interpret" any ambiguities. *People v Dempster*, 396 Mich 700, 714-715; 242 NW2d 381 (1976). Thus, a person of reasonable intelligence may not be required to guess at or meaningfully differ in opinion regarding what conduct is proscribed, but a "statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *People v Noble*, 238 Mich App 647, 651-652; 608 NW2d 123 (1999).

According to the *Random House Webster's College Dictionary* (2001), "murder" is "the unlawful killing of a person, esp. when done with deliberation or premeditation or occurring during the commission of another serious crime." According to caselaw more than 150 years old, "[m]urder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or aforethought, either express or implied. This, the common law definition, is still retained in our statute." *People v Potter*, 5 Mich 1, 6 (1858). On September 6, 1788, before Michigan was even a separate territory, an act of the territorial government of the Northwest Territory did provide that "[i]f any person or persons shall with malice aforethought, kill or slay another person, he, she, or they so offending, shall be deemed guilty of murder . . . ." Samuel Johnson's contemporary

A Dictionary of the English Language, Vol II (6th ed, 1785), defined "murder," in relevant part, as "[t]he act of killing a man unlawfully; the act of killing criminally." In short, the term has been settled in the law and in common parlance for centuries.

Of course, not all killing constitutes murder: "malice aforethought is the 'grand criterion' which elevates a homicide, which may be innocent or criminal, to murder." *Aaron*, *supra* at 714 (footnote and citation omitted). But the fact that there are circumstances under which a killing will not be murder, such as accidents or in self-defense, is also well established. See, e.g., *Errington and Others' Case*, 2 Lewin, Crown Cas 217, 219-220; 168 Eng Rep 1133, 1134 (Newcastle Assizes, 1838),[4] often studied in law school. This is well known in everyday life, as well. Exactly what constitutes "malice aforethought" is a term of art, but again, it is defined both in caselaw and in the dictionary.

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[4] The defendants in that case were charged with murder.

> It appeared, that the deceased, being in liquor, had gone at night into a glass-house, and laid himself down upon a chest: and that while he was there asleep the prisoners covered and surrounded him with straw, and threw a shovel of hot cinders upon his belly; the consequence of which was that the straw ignited, and he was burnt to death.
>
> There was no evidence in the case of express malice; but the conduct of the prisoners indicated an entire recklessness of consequences, hardly consistent with anything short of design.
>
> Patteson, J., cited from the text books the law applicable to the case, and pointed the attention of the jury to the distinctions which characterise murder and manslaughter. He then adverted to the fact of there being no evidence of express malice; but told them, that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter.
>
> The jury took a merciful view of the case, and returned a verdict of manslaughter only.

We recognize that there are circumstances under which a statute may be rendered unconstitutional because of the absence of a definition. Without purporting to render any sort of advisory opinion, we note by way of example that a statute proscribing "annoyance" may well be impermissibly vague without further guidance, simply because of the known variability in what reasonable individuals personally consider "annoying." But no hint of any such ambiguity exists here. Indeed, we find incredible the contention that any reasonable person would have to guess at the meaning of the word "murder" or what conduct is likely to expose him or her to criminal liability therefor.

Affirmed.

WOLVERINE POWER SUPPLY COOPERATIVE, INC v
DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 287553. Submitted May 14, 2009, at Petoskey. Decided September 15, 2009, at 9:00 a.m.

Wolverine Power Supply Cooperative, Inc., and Mid-Michigan Energy, LLC, sought permits from the Department of Environmental Quality for the construction of new power plants. While the applications were pending, Wolverine requested a declaratory ruling from the department that Mich Admin Code, R 336.2830, which allowed aggrieved persons to seek a contested case hearing to challenge the approval or denial of a permit to install a major source of air emissions, was invalid or could not be applied to Wolverine's application. The department denied the request. Wolverine and Mid-Michigan filed complaints in the Missaukee Circuit Court against the department, seeking a declaratory judgment that the rule was invalid. The court, William M. Fagerman, J., granted Wolverine and Mid-Michigan summary disposition and determined that the rule was contrary to MCL 324.5501 *et seq*. The department appealed, and the Court of Appeals granted Consumer Energy Company's motion to intervene.

The Court of Appeals *held*:

The National Resources and Environmental Protection Act authorizes the department to promulgate rules governing permits to install facilities that produce air emissions, MCL 324.5505, and rules governing renewable permits to operate major sources of air emissions, MCL 324.5506. MCL 324.5505(8) provides that any person may seek judicial review of the issuance or denial of a permit to install by a direct appeal in the circuit court in accordance with MCL 600.631. MCL 324.5506(14), however, specifies two separate review procedures for entities seeking review with respect to operating permits. Owners or operators of a facility may seek a contested case hearing when denied an operating permit, and any person may seek judicial review under MCL 600.631 of the issuance or denial of an operating permit. The inclusion of a contested case procedure in MCL 324.5506(14) for permits to operate and the omission of a contested case procedure in MCL 324.5505(8) for permits to install, read in combination with the

statement in MCL 324.5505(8) that "[p]etitions for review shall be the exclusive means to obtain judicial review" of the issuance or denial of a permit to install, demonstrates that the contested case procedure is not available for decisions on permits to install. The department lacked authority to promulgate Mich Admin Code, R 336.2830.

Affirmed.

ENVIRONMENT — AIR QUALITY — ADMINISTRATIVE LAW — PERMITS TO INSTALL MAJOR SOURCES OF AIR EMISSIONS — JUDICIAL REVIEW OF PERMITS TO INSTALL SOURCES OF AIR EMISSIONS — CONTESTED CASE PROCEDURES.

Judicial review is the exclusive means of obtaining review of decisions by the Department of Environmental Quality on permits to install major sources of air emissions (MCL 324.5505[8], 324.5506[14]; Mich Admin Code, R 336.2830).

Warner Norcross & Judd LLP (by *John J. Bursch*, *Steven C. Kohl*, and *Sarah C. Lindsey*) for Wolverine Power Supply Cooperative, Inc.

Varnum LLP (by *Aaron M. Phelps* and *Bruce Goodman*) for Mid-Michigan Energy, LLC.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Neil D. Gordon*, Assistant Attorney General, for the Department of Environmental Quality.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Ronald E. Baylor*, *Jaclyn Shoshana Levine*, and *Kelly M. Martorano*), for Consumers Energy Company.

Before: WHITBECK, P.J., and DAVIS and GLEICHER, JJ.

PER CURIAM. Defendant, Department of Environmental Quality (the Department), appeals as of right the trial court's order granting plaintiffs, Wolverine Power Supply Cooperative, Inc., and Mid-Michigan Energy, LLC, summary disposition under MCR 2.116(C)(10). Because we conclude that the Department had no authority to pro-

mulgate the rule in question—which adds a contested case procedure for permits to install major sources of air emissions—we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The Department is a state agency that administers federal and state air quality standards. The Department has promulgated rules for the prevention of significant deterioration of air quality under which entities seeking to install new major sources of air emissions must obtain permits from the Department. In 2006, the Department promulgated Rule 1830.[1] Rule 1830 allows persons to request a formal hearing, known as a contested case hearing, after receiving notice of the Department's approval or denial of a permit.

Plaintiffs Wolverine and Mid-Michigan are companies that provide electricity to Michigan residents. Intervenor Consumers Energy Company is also a company that provides electricity to Michigan residents. In September 2007, Wolverine and Mid-Michigan sought permits from the Department regarding the proposed construction of new power plants that would use coal and biomass fuels. While the permit applications were pending, Wolverine requested a declaratory ruling from the Department that Rule 1830 was invalid or that it could not be applied to Wolverine's permit application. In June 2008, the Department denied Wolverine's request, stating that the request "does not meet the requirements for issuance of a declaratory ruling." The Department also stated that it "had no authority to strike down a rule, nor does it have the authority to ignore its application to a particular licensee."

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[1] Mich Admin Code, R 336.2830.

Wolverine and Mid-Michigan then filed complaints against the Department, seeking a declaratory judgment that Rule 1830 was invalid. At the subsequent summary disposition hearing, Wolverine's counsel asserted that the permitting program for the prevention of significant deterioration of air quality had been in effect for more than 20 years. (The program for the "prevention of significant deterioration" of air quality is "the major source preconstruction permit program" for installation of sources of air emissions.[2]) According to Wolverine's counsel, during those 20 years, the Department conducted the permitting process as a "delegated state," meaning that the Department reviewed permit applications related to the prevention of significant deterioration of air quality under the authority of the United States Environmental Protection Agency. Wolverine's counsel explained that the Department adopted Rule 1830 as part of a set of rules to become an "approved state," meaning that the Department would review permit applications related to the prevention of significant deterioration of air quality under its own authority.

Wolverine's counsel argued that Rule 1830 was a "sweeping change" that was not required by the federal notice and comment provisions and "does not effectuate the purposes of the clean air act."[3] Counsel stated that a contested case hearing is vastly different from circuit court review of administrative decisions, noting that a contested case hearing can be a lengthy process that involves discovery and an evidentiary record. Mid-Michigan's counsel presented similar arguments.

In response, the Department's counsel argued that Rule 1830 merely "changed the point in the permitting

[2] Mich Admin Code, R 336.2801(jj).

[3] 42 USC 7470 *et seq*.

process where there is a final agency action." The Department's counsel explained that before the promulgation of Rule 1830, applicants could appeal permit decisions directly in circuit court. Rule 1830 "added a step"; that is, it allowed applicants or other aggrieved persons to seek contested case hearings. Counsel indicated that after a decision on the contested case hearing, permit applicants could appeal in circuit court. Counsel acknowledged that the contested case hearing procedure could add substantial time to the permitting process.

In ruling on the motions, the trial court determined that Rule 1830 was contrary to the provisions of the enabling statute and that the rule would have no force or effect with respect to plaintiffs' permit applications. The Department now appeals.

II. RULE 1830 AND THE DEPARTMENT'S STATUTORY AUTHORITY

A. STANDARD OF REVIEW

The Department argues that it has clear and broad statutory authority to promulgate rules for hearings on air emission permitting decisions. According to the Department, this authority includes the power to promulgate Rule 1830, which allows persons to request contested hearings to challenge permitting decisions for new sources of air emissions. The Department asserts that Rule 1830 is an appropriate exercise of its authority to develop an evidentiary record on permitting issues before rendering a final agency decision. The Department contends that the trial court misunderstood the statutory and regulatory structure applicable to Rule 1830 and incorrectly declared the rule invalid.

Wolverine and Mid-Michigan argue that Rule 1830 is invalid. They assert that the rule conflicts with the statutory section governing review of permitting decisions

—MCL 324.5505(8)—that specifies that the exclusive review procedure for a new source permitting decision is a petition in the circuit court. They contend that the section does not allow contested case hearings for new source permitting decisions. They go on to argue that the Department cannot rely on general statutory provisions for authority to promulgate the rule at issue for three reasons. First, the Department failed to present this argument to the trial court, so the argument is waived. Second, the general statutory provisions are reserved for the Commission of Natural Resources, not the Department. Third, according to Wolverine, the Department's position is contrary to the position it took and prevailed on in unrelated litigation, and thus it is estopped from pursuing its argument in the present case.

Consumers Energy additionally argues that this Court should reject the Department's proposed statutory interpretation because the interpretation violates well-established rules of statutory construction. Statutory construction rules require this Court to adhere to unambiguous statutory language, and, according to Consumers Energy, the enabling language here unambiguously precludes contested case hearings on new source emission permits. Consumers Energy asserts that the statutory construction rules also require the Court to apply the most specific statute in a topic area, and the most specific statute applicable to new source permits states that the exclusive means for review is a judicial review, not a contested case hearing.

According to Consumers Energy, aside from the rules of statutory construction, Rule 1830 is unnecessary and creates undue confusion regarding the review process for new source emission permits because the application process for permits provides ample opportunity for technical review and public comment, rendering later

contested case hearings unnecessary. Consumers Energy asserts that the Legislature intentionally excluded contested case hearings for new source permits because those permits involve initial licenses and do not require the formal due process protections available to holders of existing permits. Consumers Energy contends that Rule 1830 conflates two distinct statutory methods of administrative procedure and is thus invalid.

The issue whether the Department was within its statutory authority in promulgating Rule 1830 is a question of law, which this Court reviews de novo.[4]

B. ISSUE PRESERVATION

As a preliminary matter, we note that the Department preserved the basic issue here by presenting it to the trial court in a summary disposition brief and at the summary disposition hearing. However, on appeal the Department relies in part on MCL 324.1101, which it did not rely on in the trial court. Therefore, Wolverine and Mid-Michigan claim that the Department failed to preserve its argument concerning MCL 324.1101. But the Department maintains that no preservation was required because reliance on MCL 324.1101 is merely part of a legal argument applicable to the question whether it had statutory authority to promulgate Rule 1830. Further, the Department points out that this Court may disregard preservation requirements when the factual record presents the necessary issues or when consideration of the unpreserved argument is necessary to the proper analysis of the appeal.[5]

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[4] *McNeil v Charlevoix Co*, 275 Mich App 686, 691; 741 NW2d 27 (2007), aff'd 484 Mich 69 (2009). See generally *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 100-109; 754 NW2d 259 (2008).

[5] See *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

This Court has previously allowed an appellant who challenged the validity of a regulation to pursue an argument on appeal that had not been preserved in the trial court.[6] In *McNeil v Charlevoix Co*, this Court determined that the issue whether an agency had authority to develop regulations was a question of law and that because the record contained the facts necessary to address the question, this Court would review the appellant's argument.[7] Similarly, the question presented here encompasses the Department's authority to promulgate a regulation, and consideration of MCL 324.1101 is necessary to a full and proper resolution of the appeal. Accordingly, we will consider the Department's argument regarding MCL 324.1101.

C. REGULATION OF AIR EMISSIONS

The federal Clean Air Act requires states to regulate air emissions.[8] The corresponding Michigan statutes are codified in part 55 of Michigan's Natural Resources and Environmental Protection Act (NREPA).[9] The NREPA delineates air emissions requirements and authorizes the Department to promulgate rules governing *permits to install* facilities that produce air emissions.[10] The NREPA also authorizes the Department to promulgate rules governing renewable permits to *operate*, as opposed to install, major sources of air emissions.[11] The NREPA requires the Department to provide for public notice and comment on permit applications and to provide for public hearings if there is a known public

[6] *McNeil*, *supra* at 693-694.

[7] *Id*. at 694 n 8.

[8] 42 USC 7407.

[9] MCL 324.5501 *et seq*.

[10] MCL 324.5505(2).

[11] MCL 324.5506; see Mich Admin Code, R 336.1210 and 336.1211.

controversy about an application.[12] The Department adopted rules governing the prevention of significant deterioration of air quality and the permitting process.[13] The permitting process requires the owner of a proposed project to submit "information required by the department on the application form," which includes information such as the topography, climatology, and hydrology of the proposed site, as well as data on proposed fuels and projected emissions and a modeling analysis of air quality effects.[14]

D. RULE 1830

Rule 1830 broadened the method for interested parties to challenge a *permit to install* a new source of air emissions.[15] Rule 1830 reads, in pertinent part:

> A person aggrieved by an action or inaction of the department under prevention of significant deterioration of air quality regulations may request a formal hearing, under 1969 PA 306, MCL 24.201. The following apply:
>
> (a) The request shall be received by the department within 30 days after the person received notice of the decision to approve or deny the permit.
>
> (b) The final decision in granting a contested case hearing lies with the department. . . .
>
> (c) When the department issues a permit . . . , the permit is valid upon issuance and it is not automatically stayed if a person requests a formal hearing pursuant to this rule. A permittee may immediately initiate construction after permit issuance. However, the permittee faces the risk that a subsequent hearing may alter the terms or

[12] MCL 324.5511(3).

[13] Mich Admin Code, R 336.2801 to 336.2830.

[14] Mich Admin Code, R 336.1203 and 336.1205.

[15] See MCL 324.5505(1); Mich Admin Code, R 336.1116(f).

> conditions of the permit.[16]

Thus, Rule 1830 allows aggrieved persons and permit applicants to seek a contested case hearing to challenge the approval or denial of a *permit to install*.[17]

E. THE ADMINISTRATIVE PROCEDURES ACT

In referring to "1969 PA 306, MCL 24.201," Rule 1830 invokes the contested case hearing provisions of Michigan's Administrative Procedures Act.[18] According to the Administrative Procedures Act, a contested case hearing is

> a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.[19]

F. THE DEPARTMENT'S RULEMAKING AUTHORITY

The Department's rulemaking authority derives from powers that the Michigan Legislature has granted.[20] To determine whether a particular rule is a valid exercise of an agency's authority, this Court applies a three-part test: "(1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the en-

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[16] Mich Admin Code, R 336.2830.

[17] Mich Admin Code, R 336.2830(b).

[18] MCL 24.271 to 24.287.

[19] MCL 24.203(3).

[20] See *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004).

abling statute; and (3) whether it is arbitrary or capricious."[21] The parties' arguments focus on the first two parts of the test.

To address these arguments, this Court must examine the NREPA's enabling sections and determine whether the Department has authority to provide contested case hearings specifically with respect to *permits to install*. The question whether the NREPA provides the requisite authority is a matter of statutory construction.[22] This Court recently reiterated the general principles governing statutory construction in *Oneida Charter Twp v Grand Ledge*:

> When interpreting the meaning of a statute, our main objective is to ascertain and give effect to the Legislature's intent. The first step is to determine whether the language of the statute is plain and unambiguous. If the language is unambiguous, we must assume that the Legislature intended its plain meaning and, accordingly, we must apply the statute's language as written. In such instances, we must assume that every word has some meaning and we must give effect to every provision, if possible. In doing so, we are to give words their plain and ordinary meaning, unless otherwise defined by the Legislature. We may not speculate regarding the Legislature's probable intent, nor may we "inquire into the knowledge, motives, or methods of the Legislature." It is only when the statute's language is ambiguous that this Court is permitted to look beyond the statute's language to determine the Legislature's intent.
>
> We must not consider the statute's language in isolation; rather, we must consider each word and phrase in light of its placement and purpose within the statutory scheme. Subsections of a statute are not to be read dis-

[21] *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 484; 499 NW2d 367 (1993).

[22] *Verizon North, Inc v Pub Service Comm*, 263 Mich App 567, 569; 689 NW2d 709 (2004).

> cretely, but as part of a whole. "[T]he entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole."
>
> Finally, we are mindful that "it is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls."[23]

G. MCL 324.5505

(1) GENERAL PROVISIONS

MCL 324.5505 is the section of NREPA's air pollution control provisions that governs permits to install. MCL 324.5505 expressly authorizes the Department to grant or deny permits to install and to promulgate rules for issuing permits. The statute requires entities to obtain permits from "the department."[24] The NREPA defines "department" as the director of the Department of Natural Resources or the director's designee.[25] In 1995, an executive order transferred the powers of the Air Quality Division of the Department of Natural Resources to the Department.[26] The executive order transferred all "statutory authority, powers, duties, functions and responsibilities" of the Department of Natural Resources Air Quality Division, "including but not limited to the authority, powers, duties, functions and responsibilities set forth in . . . [MCL] 324.5501 *et seq*."[27]

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[23] *Oneida Charter Twp v Grand Ledge*, 282 Mich App 435, 442-443; 766 NW2d 291 (2009), rev'd on other grounds 485 Mich ___ (Docket No. 138520, entered September 11, 2009) (citations omitted).

[24] MCL 324.5505(1).

[25] MCL 324.301(b).

[26] MCL 324.99903, compiling Executive Reorganization Order 1995-16.

[27] MCL 324.99903, ¶ 3(a).

(2) RULEMAKING POWERS

Various subsections of MCL 324.5505 grant certain powers to the Department. Subsection (2) states that the "department shall promulgate rules to establish a permit to install program to be administered by the department."[28] Similarly, subsection (4) states that the "department may promulgate rules to provide for the issuance of general permits"; subsection (5) states that the "department may issue a permit to install"; and subsection (6) states that the "department may promulgate rules to establish a program that authorizes issuance of nonrenewable permits to operate for sources, processes, or process equipment that are not subject to the requirement to obtain a renewable operating permit pursuant to [MCL 324.5506]."[29]

(3) SUBSECTION (8)

MCL 324.5505(8), hereinafter "subsection (8)," addresses appeals from permitting actions. Unlike the subsections quoted earlier, which expressly authorize the Department to take certain actions, subsection (8) does not directly delegate authority to the Department. Rather, subsection (8) delineates the appeal process applicable to *permits to install*, providing that any person may seek judicial review of the issuance or denial of such a permit:

> Any person may appeal the issuance or denial by the department of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6), for a new source in accordance with section 631 of the revised judicature act of 1961, 1961 PA 236, MCL 600.631. Petitions for review shall be the exclusive means

[28] MCL 324.5505(2).

[29] MCL 324.5505(4) to (6).

> to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. Appeals of permit actions for existing sources are subject to [MCL 324.5506(14)].[30]

The appeal process to which subsection (8) refers is a direct appeal in the circuit court under the Revised Judicature Act. Under that act,

> [a]n appeal shall lie from any order, decision, or opinion of any state board, commission, or agency . . . to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases."[31]

Wolverine, Mid-Michigan, and Consumers Energy argue that subsection (8), through its pronouncement that "[p]etitions for review shall be the exclusive means to obtain judicial review of such a permit," plainly and unambiguously limits permit-to-install appeals to the review procedure available under the Revised Judicature Act; that is, appeals in circuit court. They assert that, given the reference to this "exclusive" procedure, the Department's attempt to add a contested case hearing procedure is invalid. But the terms of subsection (8) do not, in and of themselves, support this argument.

There can be no dispute that the statutory term "shall" is mandatory; it expresses a directive, not an option.[32] Also, the term "exclusive" is unambiguous; it

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[30] MCL 324.5505(8).

[31] MCL 600.631.

[32] *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008).

means "limited to that which is designated[.]"[33] However, when read in context, these words simply provide that *a petition for review*, as opposed to some other means of review, *shall be the exclusive means* to obtain *judicial* (that is, circuit court) review of the Department's permit issuance or denial. Contrary to how Wolverine, Mid-Michigan, and Consumers Energy would have us read the provision, subsection (8), on its face, does not state that *judicial* review is the exclusive means to obtain review. In other words, subsection (8) does not, by itself, limit review exclusively to a *judicial* review procedure. Therefore, when read alone, subsection (8) might arguably permit *administrative*, as well as *judicial*, review. But, as we will explain, when compared with MCL 324.5506(14), it becomes clear that the Legislature knows how to allow for both administrative and judicial review of Department decisions, yet chose not to provide for both of those procedures in subsection (8).

H. MCL 324.5506(14)

MCL 324.5506 governs operating permits for sources of air emissions. It authorizes the Department to promulgate rules to establish an *operating-permit* program, including inspections, monitoring, and compliance plans.[34] MCL 324.5506(14), hereinafter "subsection (14)," addresses review of *operating-permit* decisions. Unlike subsection (8), subsection (14) mandates two separate review procedures for two types of entities that may seek review concerning *operating permits*. The first review procedure is a contested case hearing, which is available only to owners or operators of a facility seeking review of the denial of an operating

[33] *Random House Webster's College Dictionary* (1997).

[34] MCL 324.5506(4)(b) and (d).

permit.[35] The second procedure is judicial review, which is available to any person seeking review of the issuance or denial of an operating permit. Subsection (14) reads:

> A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under [MCL 324.5505(6) (issuance of nonrenewable permits to operate)] may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any person may appeal the issuance or denial of an operating permit in accordance with section 631 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.631 of the Michigan Compiled Laws. A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action. Such a petition may be filed after that deadline only if it is based solely on grounds arising after the deadline for judicial review and if the appeal does not involve applicable standards and requirements of the acid rain program under title IV. Such a petition shall be filed within 90 days after the new grounds for review arise.[36]

As Wolverine, Mid-Michigan, and Consumers Energy point out, there is a striking distinction between the review procedures provided in subsection (8), concerning *permits to install*, and those provided in subsection (14), concerning *operating permits*. Subsection (8) allows "[a]ny person" to "appeal the issuance or denial"

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[35] MCL 324.5506(14).

[36] MCL 324.5506(14).

of a *permit to install* by seeking a review under the Revised Judicature Act.[37] By contrast, subsection (14) allows owners or operators to seek a contested case hearing under the Administrative Procedures Act on an *operating-permit* denial and allows "[a]ny person" to seek a review under the Revised Judicature Act of the "issuance or denial of an operating permit . . . ."[38] When the Legislature includes a provision in one statute and omits the provision in a related statute, the Court should construe the omission as intentional and should not include an omitted provision where none exists.[39] We conclude that the inclusion of the contested case procedure in subsection (14), concerning *operating permits*, but not in subsection (8), concerning *permits to install*, demonstrates the Legislature's decision that contested case hearings are appropriate for denials of permits to operate, but are not appropriate for decisions on permits to install.

The Department maintains that because subsection (8) is silent with regard to contested case hearings, the Legislature made no conclusion on the contested case procedure for permits to install. This argument is plausible if subsection (8) is read in isolation. Subsection (8) states that a person may "appeal the issuance or denial" of a permit pursuant to the Revised Judicature Act and states that a petition for review under the Revised Judicature Act is the exclusive means to obtain "judicial review."[40] Therefore, as stated earlier, subsection (8) does not expressly prohibit *administrative* review; the subsection simply states that the Revised Judicature Act procedure is the exclusive means of *judicial* review. However, when read in combination

[37] MCL 324.5505(8).

[38] MCL 324.5506(14).

[39] *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007).

[40] MCL 324.5505(8).

with the provision for contested case hearings in subsection (14), the omission of contested case hearings in subsection (8) is purposeful. That omission, combined with the Legislature's reference to the "exclusive" means of judicial review, demonstrates to us that the contested case procedure is not available for decisions on *permits to install*.

I. MCL 324.5503

MCL 324.5503 addresses the Department's general authority for air quality regulation. The Department argues that MCL 324.5503 provides broad authority to promulgate rules. In particular, the Department cites subdivisions (b), (e), and (u), which read:

> The department may do 1 or more of the following:
>
> * * *
>
> (b) Issue permits for the construction and operation of sources, processes, and process equipment, subject to enforceable emission limitations and standards and other conditions reasonably necessary to assure compliance with all applicable requirements of this part, rules promulgated under this part, and the clean air act.
>
> * * *
>
> (e) Make findings of fact and determinations.
>
> * * *
>
> (u) Do such other things as the department considers necessary, proper, or desirable to enforce this part, a rule promulgated under this part, or any determination, permit, or order issued under this part, or the clean air act.[41]

[41] MCL 324.5503.

We conclude that the Department's reliance on MCL 324.5503 is misplaced for two reasons. First, nothing in the provisions that the Department cites relates to promulgating rules for review of agency decisions. The provisions that the Department cites allow it to issue permits, to make findings of fact, and to do other things necessary to enforce clean air standards. The issuance and enforcement of rules, however, does not necessarily include an administrative review procedure after issuance of a permit.

Second, the provisions in MCL 324.5503 are general in nature; that is, they are not tied to the Department's administration of any particular type of permits or to its review procedures. By contrast, the provisions of subsection (8) are specific in nature, governing the Department's administration of *permits to install*. When a statutory scheme provides both general and specific provisions, the more specific provisions control.[42] Accordingly, the specific provisions of subsection (8) control the Department's authority to establish review procedures. The Department cannot rely on the general provisions in MCL 324.5503 as authority for the contested case procedures in Rule 1830.

J. MCL 324.1101

(1) JUDICIAL ESTOPPEL

MCL 324.1101 governs general appellate rights of matters under the NREPA. Wolverine argues that this Court should judicially estop the Department from presenting an argument concerning MCL 324.1101. Judicial estoppel is an equitable doctrine that the Court may raise to preclude inconsistent judicial rulings.[43]

[42] *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008).

[43] *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999).

The doctrine allows courts to bar parties who have prevailed on a position in one proceeding from asserting wholly inconsistent positions in subsequent proceedings.[44] According to Wolverine, the Department took the position in a prior proceeding that MCL 324.1101 does not authorize contested case hearings on permit-to-install decisions.

However, the proceeding in which the Department took this position[45] was unrelated to the present proceeding. Generally, the judicial estoppel doctrine applies when a party's position conflicts with "a position taken earlier in the *same or related* litigation."[46] Moreover, as the Department correctly points out, the position it took in the prior proceeding was not wholly inconsistent with the position it takes here.

(2) THE DEPARTMENT'S AUTHORITY UNDER EXECUTIVE ORDERS

The agencies that have authority over natural resources have changed over time. In 1991, an executive reorganization order consolidated various boards and commissions into the Department of Natural Resources.[47] The order transferred authority that had been vested in the Commission of Natural Resources and other agencies to the Department of Natural Re-

[44] *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994).

[45] *In re Appelt*, unpublished order of the Department of Environmental Quality, entered August 14, 1996 (File No. 990-90).

[46] *Detroit Edison Co v Pub Service Comm*, 221 Mich App 370, 382; 562 NW2d 224 (1997) (emphasis added); see also *Michigan Gas Utilities v Pub Service Comm*, 200 Mich App 576, 583; 505 NW2d 27 (1993); but see *Opland*, *supra* at 363 n 8 (noting in dicta that privity is not required for judicial estoppel).

[47] Executive Reorganization Order 1991-22, compiled at MCL 299.13; *House Speaker v Governor*, 443 Mich 560, 564-565; 506 NW2d 190 (1993).

sources.[48] The order retained certain authority in the Commission of Natural Resources, in particular, that a final decision of the Department of Natural Resources relating to the issuance of permits would be subject to review by the Commission of Natural Resources.[49]

In 1995, another executive reorganization order created the Department.[50] That order transferred all of the Air Quality Division's authority to the Department, "including but not limited to . . . authority under [MCL] 324.5501 et seq."[51] Wolverine, Mid-Michigan, and Consumers Energy claim that the Department has no authority for administrative appeals under the 1995 order because the Department's predecessor under the 1991 order had no authority for administrative appeals. We disagree. The 1995 order transferred the Commission of Natural Resources' authority for administrative appeals to the Department, as follows:

> All authority to make decisions regarding administrative appeals associated with the transfers referred to in paragraphs 3 [including the transfer of the Air Quality Division], 5 and 6 above, which reside with the Commission of Natural Resources or the Michigan Department of Natural Resources, are transferred to the Director of the Michigan Department of Environmental Quality. In the event the Director is directly involved in an initial decision which is subsequently appealed through the Office of Administrative Hearings and to the Director for a decision, the Director shall appoint an individual within or outside the Michigan Department of Environmental Quality to decide the appeal.[52]

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[48] ERO 1991-22, part III.

[49] ERO 1991-22, part IV(B)(2)(b).

[50] See MCL 324.99903.

[51] MCL 324.99903, ¶ 3(a).

[52] MCL 324.99903, ¶ 7.

(3) INTERPRETATION OF MCL 324.1101

The Department argues that MCL 324.1101 "broadly authorizes [the Department] to review challenges to permitting decisions for both new and existing sources by conducting case hearings when the agency chooses to do so." According to the Department, the lack of reference to contested case hearings in MCL 324.5505 must therefore be read in the context of MCL 324.1101. MCL 324.1101 provides two procedures for review of agency decisions, the first applicable to a "final decision" of the Department regarding permits and the second applicable to other Department decisions:

> (1) If a person has legal standing to challenge a final decision of the department under this act regarding the issuance, denial, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a permit or operating license, the commission, upon request of that person, shall review the decision and make the final agency decision. A preliminary, procedural, or intermediate decision of the department is reviewable by the commission only if the commission elects to grant a review. If a person is granted review by the commission under this section, the person is considered to have exhausted his or her administrative remedies with regard to that matter. The commission may utilize administrative law judges or hearing officers to conduct the review of decisions as contested case hearings and to issue proposals for decisions as provided by law or rule.
>
> (2) In all instances, except those described in subsection (1), if a person has legal standing to challenge a final decision of the department under this act, that person may seek direct review by the courts as provided by law. Direct review by the courts is available to that person as an alternative to any administrative remedy that is provided in this act. A preliminary, procedural, or intermediate action or ruling of the department is not immediately reviewable, except that the court may grant leave for

> review of a preliminary, procedural, or intermediate action or ruling if the court determines that review of the final decision would not provide an adequate remedy. If a person is granted direct review by the courts under this section, the person is considered to have exhausted his or her administrative remedies with regard to that matter.[53]

MCL 324.1101 is general in scope, in that it applies to all permits and licenses that may issue under the NREPA, including, among many others, those for floodplain alteration, sewer systems, pesticide sales, soil erosion, and fur dealing.[54] In contrast, the rules on prevention of significant deterioration of air quality, which include Rule 1830, do not list MCL 324.1101 as an enabling authority. The preface to the rules on prevention of significant deterioration of air quality state that they are "[b]y authority conferred on the director of the department of environmental quality by sections 5503, 5505(4), and 5512 of 1994 PA 451, MCL 324.5503, 324.5505(4), and 324.5512, and Executive Reorganization Order No. 1995-18, MCL 324.99903."[55] Applying the principle that a specific statutory provision will control over a related general provision, MCL 324.1101 cannot be deemed to grant the Department authority to provide a review process for *permits to install*.[56]

In sum, the Department's reliance on the general structure of the NREPA and the general enabling statutes is unpersuasive. The Legislature designated a specific review procedure for decisions on *permits to install*, and the Department must adhere to that procedure unless and until the Legislature amends the specified review.

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[53] MCL 324.1101(1) and (2).

[54] See MCL 324.1301(d).

[55] 2006 Mich Reg 23 (January 1, 2007), p 2.

[56] *Miller*, *supra* at 613.

We note, however, that during the pendency of this appeal Governor Granholm issued an executive directive addressing the processing of air permit applications.[57] The directive declares, among other things, that the need for additional coal-fired generating plants has been reduced, and states:

> A. Before issuing a permit to install under Part 55 of the National Resources and Environmental Protection Act, 1994 PA 451, MCL 324.5501 to 324.5542, for the construction of a new coal-fired electricity generating plant, the Department of Environmental Quality shall determine whether there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare that would better protect the air, water, and other natural resources of this state from pollution than the proposed coal-fired electricity generating plant.
>
> B. Before making the determination required by Paragraph A, the Department shall first determine whether a reasonable electricity generation need exists in this state that would be served by the proposed coal-fired electricity generating plant. If a reasonable electricity generation need exists in this state, the Department shall estimate the extent of the reasonable electricity generation need.
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> * * *
>
> D. If the Department determines that a feasible and prudent alternative to the construction of a new proposed coal-fired electricity generating plant exists consistent with the reasonable requirements of the public health, safety, and welfare that would better protect the air, water, and other natural resources of this state than the proposed coal-fired electricity generating plant, the Department shall not issue a permit to install.[58]

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[57] Executive Directive No. 2009-2 (February 13, 2009).

[58] ED 2009-2, ¶¶ A, B, and D.

Although the directive does not address review procedures, it appears to establish an additional fact-finding requirement before the issuance of a permit to install. As the issue is not before us, we take no position on whether the directive requires contested case hearings to establish the necessary factual record for a challenge to a permit-to-install decision.

III. CONCLUSION

Rule 1830 directly conflicts with subsection (8). When read in conjunction with subsection (14), subsection (8) provides the exclusive means for obtaining review of the Department's decisions on *permits to install*. That procedure is a judicial review under the Revised Judicature Act. Accordingly, the Department had no authority to promulgate the provisions of Rule 1830 setting out a contested case hearing procedure for *permits to install*.

Affirmed.

BOOKER v SHANNON

Docket No. 284937. Submitted September 2, 2009, at Grand Rapids. Decided September 17, 2009, at 9:00 a.m.

Pentrilla D. Booker, also known as Pentrilla D. Shannon, by the Berrien County Prosecuting Attorney, brought an action in the Berrien Circuit Court, Family Division, against Michael T. Shannon, seeking an order requiring the defendant to repay the confinement and pregnancy expenses paid by Medicaid for four children born to the plaintiff and the defendant while they were unmarried. The court ordered defendant to repay the expenses. The defendant paid some of the expenses, married the plaintiff in 1997, and, ten years later, moved to abate the remaining expenses. The court, John M. Donahue, J., denied the motion on the basis that the marriage occurred before the effective date of the provisions of MCL 722.712 that provide for the abatement of such expenses if the father marries the mother after having been ordered to pay the expenses. The defendant appealed.

The Court of Appeals *held*:

The trial court erred by determining that the defendant was not entitled to the abatement of the expenses because he had already married the plaintiff before the effective date of the amendatory act. The only requirements for abatement under MCL 722.712(4) are that the father marry the mother after the birth of the child and provide documentation of that fact. The plain language of MCL 722.712(5) clearly provides that, although MCL 722.712(4) and (5) were not effective until October 1, 2004, orders entered before that date are also subject to abatement if the father marries the mother. The order denying the motion for abatement must be reversed, and the case must be remanded for an order abating the defendant's unpaid confinement and pregnancy expenses.

Reversed and remanded.

PARENT AND CHILD — CONFINEMENT AND PREGNANCY EXPENSES — REPAYMENT BY FATHER — ABATEMENT.

An order for the repayment of a mother's confinement and pregnancy expenses must provide that if the father marries the mother

> after the birth of the child and provides documentation of this fact, the unpaid confinement and pregnancy expenses are abated; orders for the repayment of such expenses entered before the effective date of an act providing for such abatement are subject to abatement in the same manner as those entered after that date; therefore, a father who marries the mother of his child before the effective date of the act and provides documentation of that fact is entitled to have his obligation for the payment of any unpaid expenses abated (MCL 722.712[4] and [5]).

Arthur J. Cotter, Prosecuting Attorney, and *Henry W. Ruis*, Assistant Prosecuting Attorney, for the plaintiff.

Legal Aid of Western Michigan (by *Stephanie I. Mullins*), for the defendant.

Before: SERVITTO, P.J., and FITZGERALD and BANDSTRA, JJ.

PER CURIAM. Defendant appeals, by leave granted, the trial court's order denying his motion to abate unpaid confinement and pregnancy expenses. Because defendant was entitled to abatement of the unpaid confinement and pregnancy expenses, pursuant to the plain language of MCL 722.712(4) and (5), we reverse and remand for the entry of an order abating defendant's remaining unpaid confinement and pregnancy expenses.

This matter involves hospital confinement and pregnancy expenses in connection with the birth of four children. Plaintiff, Pentrilla Booker, and defendant, Michael Shannon, the children's parents, were unmarried and Booker was receiving state medical assistance, i.e. Medicaid, when all the children were born. Medicaid thus paid Booker's confinement and pregnancy expenses.

It is undisputed that Shannon has worked only sporadically and has resided with Booker and the chil-

dren since shortly after the birth of their first child up to the present (with the exception of a couple of two-month absences throughout the years). Shannon was ordered to repay the confinement and pregnancy expenses in connection with the births of the children and made payments over the years in the amount of $1,207.

Booker and Shannon married on May 30, 1997. Ten years after the marriage, Shannon moved to abate the remaining confinement expenses (approximately $8,288) on the basis of the language of MCL 722.712. The trial court denied the motion, and this appeal followed.

On appeal, defendant argues that he is entitled to abatement of the unpaid confinement and pregnancy expenses because the applicable statute, MCL 722.712(4) and (5) (as amended by 2004 PA 253), provides for abatement of the expenses if the father marries the mother after there is an order to pay the expenses. Plaintiff agrees. However, the prosecuting attorney, acting for Berrien County, argues that because the marriage must occur *after* the effective date of the amendatory act, defendant is not entitled to the abatement of unpaid confinement and pregnancy expenses. This case presents an issue of first impression in Michigan.

The case requires this Court to consider the meaning of MCL 722.712(4) and (5). Statutory interpretation is a question of law that is reviewed de novo. *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 99; 643 NW2d 553 (2002). *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996), provides:

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be con-

> strued reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [Citations omitted.]

If judicial construction is warranted, this Court should construe the statute according to its common meaning. *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993).

MCL 722.712 provides, in pertinent part:

> (1) The parents of a child born out of wedlock are liable for the necessary support and education of the child. They are also liable for the child's funeral expenses. Subject to subsections (2) and (3), based on each parent's ability to pay and on any other relevant factor, the court may apportion, in the same manner as medical expenses of the child are divided under the child support formula, the reasonable and necessary expenses of the mother's confinement and expenses in connection with her pregnancy between the parents and require the parent who did not pay the expense to pay his or her share of the expense to the other parent. At the request of a person other than a parent who has paid the expenses of the mother's confinement or expenses in connection with her pregnancy, the court may order a parent against whom the request is made to pay to the person other than a parent the parent's share of the expenses.
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> * * *
>
> (3) If medicaid has paid the confinement and pregnancy expenses of a mother under this section, the court shall not apportion confinement and pregnancy expenses to the mother. After the effective date of the amendatory act that added this subsection, based on the father's ability to pay and any other relevant factor, the court may apportion not

> more than 100% of the reasonable and necessary confinement and pregnancy costs to the father. If medicaid has not paid the confinement and pregnancy expenses of the mother under this section, the court shall require an itemized bill for the expenses upon request from the father before an apportionment is made.
>
> (4) The court order shall provide that if the father marries the mother after the birth of the child and provides documentation of the marriage to the friend of the court, the father's obligation for payment of any remaining unpaid confinement and pregnancy expenses is abated subject to reinstatement after notice and hearing for good cause shown, including, but not limited to, dissolution of the marriage. The remaining unpaid amount of the confinement and pregnancy expenses owed by the father is abated as of the date that documentation of the marriage is provided to the friend of the court.
>
> (5) Each confinement and pregnancy expenses order entered by the court on or before the effective date of the amendatory act that added this subsection shall be considered by operation of law to provide for the abatement of the remaining unpaid confinement and pregnancy expenses if the father marries the mother and shall be implemented under the same circumstances and enforced in the same manner as for the abatement of confinement and pregnancy expenses provided by subsection (4).

MCL 722.712(3), (4), and (5), as well as a revised portion of subsection (1), became effective on October 1, 2004.

The plain language of MCL 722.712(4) clearly provides that an order for repayment of confinement and pregnancy expenses shall provide that if the father marries the mother after the birth of the child and provides documentation of this fact, the unpaid confinement and pregnancy expenses are abated. The plain language of MCL 722.712(5) clearly provides that, although subsections 4 and 5 were not effective until October 1, 2004, orders entered before October 1, 2004,

are also subject to abatement "if the father marries the mother . . . ." Further, subsection 5 is implemented under the same circumstances and enforced in the same manner as subsection 4. MCL 722.712(5). Because the only requirements for abatement under MCL 722.712(4) are that the father marries the mother after the birth of the child and provides documentation of this fact, a plain reading of MCL 722.712(5) results in a finding that orders for the repayment of confinement and pregnancy expenses entered before October 1, 2004, are also subject to abatement if the father marries the mother after the birth of the child and provides documentation of this fact. Simply put, MCL 722.712(5) places fathers who had an order providing for the payment of confinement and pregnancy expenses entered before October 1, 2004, on the same footing as fathers who had an order entered after October 1, 2004.

The prosecuting attorney argues that because the language "if the father marries the mother" employs a future tense, the marriage of the mother must take place after the effective date of the amendatory act. While the word "marries" admittedly implies a future action, to apply the statute in the limited fashion suggested by the prosecutor would not only require impermissible speculation regarding legislative intent beyond the words used, it would also undermine the entire purpose behind the statute.

First, the statutory language at issue simply reads, "if the father marries the mother . . . ." It does not read "if the father marries the mother after the effective date of this act." "This Court will not read anything into a statute that is not within the manifest intent of the Legislature as gleaned from the language of the statute itself . . . ." *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 690; 741 NW2d 579 (2007). Again,

MCL 722.712(4) provides that if the father marries the mother after the birth of the child, the father's obligation for payment of any remaining unpaid confinement and pregnancy expenses is abated (subject to reinstatement under specific circumstances). MCL 722.712(5) indicates that orders for the payment of such expenses entered by the court before the effective date of the amendatory act shall be treated in the same manner as those entered after the effective date of the amendatory act. Thus, one who marries the mother of his child *before* the date of the amendatory act is to be treated in exactly the same manner as one who marries the mother of his child *after* the date of the amendatory act.

Secondly, MCL 722.712(4) and (5) not only encourage parents of a child to marry, but also encourage the parents to *remain* married. This is evident from the language in subsection 4, which provides that the abated expenses are subject to reinstatement after dissolution of the marriage. MCL 722.712(4). This language also applies to subsection 5. MCL 722.712(5). If the prosecutor's interpretation of the statute were employed, a couple in Booker and Shannon's position could be compelled to divorce and remarry in order to alleviate the father's obligation to pay the unpaid confinement and pregnancy expenses. Surely, the Legislature did not intend and would not encourage such a consequence.

Moreover, we believe that a father should not be penalized for marrying the mother and creating a family unit on his own accord, rather than merely marrying the mother in order to alleviate his obligation to pay the unpaid confinement and pregnancy expenses, which may be the case in some circumstances. On the basis of the foregoing, we conclude that the trial court erred when it determined that defendant was not

entitled to abatement of the unpaid confinement and pregnancy expenses, pursuant to the plain language of MCL 722.712(4) and (5), because he had already married the mother of his children before the effective date of the amendatory act.

Reversed and remanded for the entry of an order abating defendant's unpaid confinement and pregnancy expenses. We do not retain jurisdiction.

MERIDIAN CHARTER TOWNSHIP v INGHAM COUNTY CLERK

Docket No. 279459. Submitted December 2, 2008, at Lansing. Decided September 22, 2009, at 9:00 a.m.

Meridian Charter Township brought an action in the Ingham Circuit Court against the Ingham County Clerk, seeking declaratory and injunctive relief with regard to an order entered by the clerk placing on the ballot at the next general election a referendum on whether to annex a parcel of property in the township to the city of East Lansing. The court, Joyce Draganchuk, J., denied the relief requested. Following the general election at which the annexation was approved, the court granted motions allowing Phillip M. Stevens, a qualified, registered elector in the township, to intervene as a plaintiff and allowing White Family Properties, LLC, the owner of the parcel involved, and the city of East Lansing to intervene as defendants. The plaintiffs filed an amended complaint, alleging that the county clerk violated MCL 168.643a and 168.646a(2) by failing to adopt ballot language that was clear and adequately apprised voters of the subject matter of the annexation proposal and by failing to properly certify the ballot language. The plaintiffs also alleged that the provisions of MCL 42.34(5) are unconstitutional and advanced other theories seeking relief. The court granted summary disposition for the defendants and dismissed the plaintiffs' claims. The plaintiffs appealed.

The Court of Appeals *held*:

1. The people, in ratifying Const 1963, art 2, § 6, were aware of the distinct meanings given to the terms "district" and "territory" in MCL 117.9(1) and intentionally used the phrase "district or territory affected" in Const 1963, art 2, § 6 to allow the Legislature to limit the electors permitted to vote on a proposed annexation to those in the territory affected, i.e., the portion of the township to be annexed.

2. Given that the fixing of municipal boundaries is a legislative function and the Legislature is permitted to change such boundaries at will, with or without the consent of the electorate, it is constitutionally permissible for the Legislature to allow only qualified, registered electors living in the portion of the township

to be annexed to vote on a proposed annexation. MCL 42.34(5) does not violate the plaintiffs' right to vote under Const 1963, art 2, § 1.

3. The provisions of MCL 42.34(5) that permit the annexation of charter township property by separate majority votes of the qualified and registered electors living within the annexation area and eligible voters residing in the annexing city or village further the legitimate governmental interest of providing a means appropriate to the resolution of disagreements concerning annexation of territory to a city, and the classification imposed by the statute rationally relates to achieving that interest. The statute does not violate the constitutional guarantee of equal protection.

4. The provision in MCL 42.34(5), stating that a majority of the qualified and registered electors voting on the annexation question in the city or village to which the portion is to be annexed and the portion of the township that is to be annexed must approve the proposed annexation, does not impose an unlawful residency requirement for voting.

5. The provision in MCL 42.34(5) requiring a petition for annexation to be signed by 20 percent of the registered electors in the area to be annexed does not have the effect of permitting the petitioners to define residence for voting purposes.

6. The county clerk complied with the requirements of the Charter Township Act, MCL 42.1 *et seq*., in determining the validity of the annexation petition and ordering a referendum on the question. The clerk was not required to comply with both the provisions of MCL 168.646a(2) of the Michigan Election Law, which provides certification procedures for ballot proposals in general, and the provisions of the Charter Township Act that specifically address annexations by petition and referendum. The more specific provisions contained in MCL 42.34(6) control over MCL 168.646a(2).

7. The ballot language was sufficient to apprise voters of the subject matter of the proposal. Any violation of the requirements for such language contained in MCL 168.643a was harmless.

Affirmed.

1. ELECTIONS — CONSTITUTIONAL LAW — WORDS AND PHRASES — DISTRICT — TERRITORY.

The terms "district" and "territory" in the phrase "district or territory affected" in Const 1963, art 2, § 6 have distinct meanings and are not interchangeable.

2. MUNICIPAL CORPORATIONS — BOUNDARIES.

The fixing of municipal boundaries is a legislative function; the Legislature may change such boundaries at will, with or without the consent of the electorate.

3. ELECTIONS — CHARTER TOWNSHIPS — ANNEXATIONS — CONSTITUTIONAL LAW — RIGHT TO VOTE — DUE PROCESS.

The provisions of the Charter Township Act that allow only qualified, registered electors living in the portion of a township that is to be annexed to vote on the proposed annexation, and that permit annexation by separate majority votes of the qualified and registered electors living within the annexation area and eligible voters residing in the annexing city or village, do not violate the constitutionally guaranteed right to vote or right to due process (Const 1963, art 2, §§ 1 and 6; MCL 42.34[5]).

4. ELECTIONS — CHARTER TOWNSHIPS — ANNEXATIONS — RESIDENCY REQUIREMENTS.

The provision of the Charter Township Act stating that a majority of the qualified and registered electors voting on an annexation question in the city or village to which the portion of the township is to be annexed and the portion of the township that is to be annexed must approve the proposed annexation does not impose an unlawful residency requirement to vote on the annexation question (MCL 42.34[5]).

5. ELECTIONS — CHARTER TOWNSHIPS — ANNEXATIONS — CERTIFICATION PROCEDURES.

The specific provisions of the Charter Township Act concerning the certification procedures pertaining to annexations by petition and referendum control over the certification procedures for ballot proposals in general contained in the Michigan Election Law when there is a conflict between the two provisions (MCL 42.34[6], 168.646a).

Hubbard, Fox, Thomas, White & Bengtson, P.C. (by *Michael G. Woodworth*, *Andria M. Ditschman*, and *Mark T. Koerner*), for Meridian Charter Township and Phillip M. Stevens.

Cohl, Stoker, Toskey & McGlinchey, P.C. (by *David G. Stoker* and *Timothy M. Perrone*), for the Ingham County Clerk.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Brian P. Morley*), for White Family Properties, LLC.

McGinty, Hitch, Housefield, Person, Yeadon & Anderson, P.C. (by *Dennis E. McGinty*), for the city of East Lansing.

Amici Curiae:

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *David E. Pierson*), for the Michigan Association of Realtors and the Michigan Association of Home Builders.

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C. (by *John H. Bauckham*), for the Michigan Townships Association.

Before: SAAD, C.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. This case involves the annexation of property in plaintiff, Meridian Charter Township, to the city of East Lansing, intervening defendant. Meridian Township and intervening plaintiff, Phillip M. Stevens, a qualified, registered elector in the township, appeal as of right the trial court's order denying their motion for summary disposition and granting summary disposition in favor of defendant, Ingham County Clerk, and intervening defendants, White Family Properties, LLC, and the city of East Lansing. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In August 2006, Mike Bryanton, the Ingham County Clerk, received a petition for annexation of property in Meridian Township to East Lansing. The property is a 6.33-acre parcel owned by intervening defendant White Family Properties, LLC. After verifying the petition's

lone signature and finding the petition valid, Bryanton ordered a referendum on the question of the annexation at the next general election in November 2006. Meridian Township filed a complaint in the trial court requesting declaratory relief, injunctive relief, and an accelerated hearing. It alleged that the ballot language was not properly certified under MCL 168.646a(2) and the Charter Township Act (CTA), MCL 42.1 *et seq*., particularly MCL 42.34(5), was unconstitutional to the extent that it barred qualified electors in the township affected by a proposed annexation from voting on the referendum. The township's requests were denied.

In accordance with MCL 42.34(6), a referendum on the question of the annexation was held at the general election. The annexation passed, with 6,824 electors in East Lansing voting "yes" and 3,975 voting "no." In the portion of Meridian Township to be annexed, the measure passed with a total of two votes being cast, both in favor of the annexation.

Plaintiffs filed a second amended complaint in December 2006, following an order permitting Stevens and East Lansing to intervene. In count I, plaintiffs alleged that Bryanton violated MCL 168.643a and 168.646a(2) by failing to adopt ballot language that was clear and adequately apprised voters of the subject matter of the annexation proposal and by failing to properly certify the ballot language. In count II, plaintiffs alleged several constitutional infirmities in MCL 42.34(5). Count III incorporated plaintiffs' claims to advance a quo warranto theory.

Plaintiffs filed a motion for summary disposition under MCR 2.116(C)(10), along with three supporting affidavits: the Meridian Township Manager averred that the annexation affected the entirety of the township, not simply the specific property to be annexed; the

Meridian Township Clerk averred that she did not prepare, approve, or certify the ballot language; and Stevens averred that he had an interest in the annexation and would have voted on it had MCL 42.34(5) not prohibited him from doing so. The trial court granted summary disposition to defendants under MCR 2.116(I)(2) and dismissed plaintiffs' claims. Plaintiffs now appeal as of right.

II. STANDARDS OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden,* 461 Mich at 120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. Under MCR 2.116(I)(2), summary disposition is properly granted in favor of the nonmoving party if that party, rather than the moving party, is entitled to judgment. *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 245; 760 NW2d 828 (2008). "Questions of constitutional interpretation and statutory interpretation are questions of law reviewed de novo by this Court." *Dep't of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

III. THE CONSTITUTIONALITY OF MCL 42.34(5)

Plaintiffs argue that MCL 42.34(5) violates the due process and equal protection provisions of the United

States and Michigan constitutions by barring qualified electors in the township affected by a proposed annexation from voting on the annexation referendum, imposing on electors a residency requirement not constitutionally imposed, and delegating the Legislature's responsibility to determine residency for voting purposes to the petitioners seeking annexation. We disagree.

"[A] statute is presumed to be constitutional unless its unconstitutionality is clearly apparent." *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). The presumption of constitutionality even justifies a construction that is against the natural interpretation of the statutory language, if necessary to uphold the law. *Lowe v Dep't of Corrections (On Rehearing)*, 206 Mich App 128, 137; 521 NW2d 336 (1994). The party challenging the constitutionality of the statute has the burden of proving its invalidity. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) (*In re 2005 PA 71*).

A. VOTING RIGHTS GUARANTEES

According to plaintiffs, MCL 42.34(5) violates constitutional voting rights guarantees by permitting only qualified, registered electors in the portion of the township to be annexed, rather than all the qualified electors in the township, to vote on a proposed annexation. MCL 42.34(5) provides:

> Notwithstanding subsections (1) and (3), a portion of a charter township contiguous to a city or village may be annexed to that city or village upon the filing of a petition with the county clerk which petition is signed by 20% of the registered electors in the area to be annexed and approval by a majority of the qualified and registered electors voting

> on the question in the city or village to which the portion is to be annexed, and the portion of the township which is to be annexed, with the vote in each unit to be counted separately.

Plaintiffs assert, contrary to the plain language of MCL 42.34(5), that all the qualified electors in the township are entitled to vote on a proposed annexation because a successful annexation would affect the entirety of the township. In so arguing, plaintiffs point to Const 1963, art 2, which provides, in relevant part:

> Sec. 1. Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.
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> * * *
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> Sec. 6. Whenever any question is required to be submitted by a political subdivision to the electors for the increase of the ad valorem tax rate limitation imposed by Section 6 of Article IX for a period of more than five years, or for the issue of bonds, only electors in, and who have property assessed for any ad valorem taxes in, any part of the district or territory to be affected by the result of such election or electors who are the lawful husbands or wives of such persons shall be entitled to vote thereon. All electors in the district or territory affected may vote on all other questions.

Specifically, plaintiffs argue that MCL 42.34(5) violates the directives in Const 1963, art 2, § 1 that "[e]very citizen of the United States" who satifies age and residency requirements "shall be an elector and qualified to vote in any election except as otherwise provided in this constitution," and Const 1963, art 2,

§ 6 that "[a]ll electors in the district or territory affected may vote" on all questions other than an increase of the ad valorem tax rate for more than five years or the issue of bonds. They argue that both provisions "liberally confer[] the right to vote" subject only to two narrow exceptions, neither of which is at issue here. Thus, according to plaintiffs, all qualified electors in the "district or territory affected" by a proposed annexation, including the entirety of the township, are entitled to vote on the referendum.

Plaintiffs rely on the Supreme Court's decision in *Renne v Oxford Twp*, 380 Mich 39; 155 NW2d 852 (1968), for the proposition that the phrase "district or territory affected" in Const 1963, art 2, § 6 includes the entirety of the township affected by a proposed annexation. In that case, the plaintiff obtained rezoning of property he owned in the defendant township. *Renne v Oxford Twp*, 5 Mich App 415, 418; 146 NW2d 819 (1966). After the township board enacted an amendment to the zoning ordinance to accomplish this rezoning, property owners residing in the unincorporated portion of the township filed petitions with the board requesting that the amendment be submitted "for approval or rejection by the 'persons residing in and owning property assessed for taxes in the unincorporated portion of the township,' " pursuant to MCL 125.282, repealed by 2006 PA 110. *Renne*, 5 Mich App at 418. The plaintiff filed a complaint in the trial court to restrain the township from holding a referendum election on the amendment. *Id*. The plaintiff argued that "by restricting the right to vote to those within the unincorporated portion of" the township, MCL 125.282 violated Const 1963, art 2, § 6 "because the district or territory affected by the vote is something other than the area within the boundaries of the political subdivision." *Renne*, 5 Mich App at 420. The trial court denied

the plaintiff relief. *Id*. at 418. The Court of Appeals affirmed the trial court, concluding that "the apparent meaning of 'district or territory affected' [in Const 1963, art 2, § 6] is clearly 'political subdivision.' " *Renne*, 5 Mich App at 420.

The Supreme Court granted leave to consider this Court's "possibly too broad conclusion" that the phrase "district or territory affected" in Const 1963, art 2, § 6 means "political subdivision." *Renne*, 380 Mich at 42. It stated that the phrase, "coupled as it is in the last sentence with 'all electors' and 'all other questions,' may in conceivable circumstances render electors eligible to vote upon a question shown as affecting the district or territory in which they reside, even though they do not reside in the specific political subdivision which, as here, has initiated the election in question." *Id*. at 42-43. Nonetheless, the Supreme Court affirmed the Court of Appeals, noting that the plaintiff made no showing that any electors residing outside the unincorporated portion of the township "were 'electors in the district or territory affected.' " *Id*. at 43. The Court held: "Such failure of proof both warranted and required holding that [the] plaintiff was not by section 6 entitled to restrain the election which the 'electors residing in the unincorporated portion of the township' had initiated pursuant to [MCL 125.282]. They, the electors so residing, were on the face of the pleadings and submissions of the parties the only eligible voters at such election." *Renne*, 380 Mich at 43.

Plaintiffs reason, pursuant to the Supreme Court's statements in *Renne*, that if the plaintiff in that case had presented evidence establishing that any electors residing outside the unincorporated portion of the township were "affected" within the meaning of Const 1963, art 2, § 6, those electors would have been entitled

to vote on the zoning amendment at issue. Plaintiffs further reason that because they have presented at least some evidence that a successful annexation would affect the entirety of the township from which property is to be annexed, this Court should find that all the electors living in the township are entitled to vote on the annexation. While we agree with plaintiffs that the Supreme Court's decision in *Renne* opened the door to interpreting the phrase "district or territory affected" to mean something other than "political subdivision," the Supreme Court did not address "the unique nature of annexation proceedings," *Midland Twp v State Boundary Comm*, 401 Mich 641, 664; 259 NW2d 326 (1977), or the constitutionality of MCL 42.34(5). Therefore, we cannot conclude, on the basis of the Supreme Court's statements in *Renne* alone, that this case qualifies as one of the "conceivable circumstances" when electors are eligible to vote on a question affecting "the district or territory in which they reside, even though they do not reside in the specific political subdivision [that] initiated the election in question." *Renne*, 380 Mich at 42-43.

Plaintiffs argue that, in addition to the Supreme Court's decision in *Renne*, the Home Rule City Act (HRCA), MCL 117.1 *et seq*., establishes that the phrase "district or territory affected" includes the entirety of the township affected by a proposed annexation. Plaintiffs point to MCL 117.9(1), which states, in part: "The district to be affected by the proposed incorporation, consolidation, or change of boundaries is considered to include the whole of each city, village, or township from which territory is to be taken or to which territory is to be annexed." According to plaintiffs, because the HRCA was enacted in 1909, "the ratifiers of Michigan's present Constitution were aware and rightfully expected that incorporating the phrase 'district or terri-

tory affected' into Const 1963, art 2, § 6, would necessarily include the entirety of a township whose boundaries were proposed to be changed via a ballot proposal."[1]

We acknowledge that in interpreting constitutional provisions, this Court must "determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Co Rd Ass'n of Michigan v Governor*, 474 Mich 11, 15; 705 NW2d 680 (2005) (citation and quotation marks omitted). Constitutional provisions are presumed to have been framed and adopted in accordance with the understanding of prior and existing law, and courts are bound to adhere to that understanding. *Richardson v Secretary of State*, 381 Mich 304, 311-312; 160 NW2d 883 (1968). Contrary to plaintiffs' argument, however, the Legislature did not use the terms "district" and "territory" interchangeably in MCL 117.9(1). In the version of MCL 117.9(1) in effect in 1963, and the current version of the statute, the Legislature used the term "district" to describe the larger political subdivision, i.e., "the whole of each city, village, or township," from which property is to be taken or to which property is to be annexed, and the term "territory" to describe the property to be taken. Given the distinct meanings of these two terms in MCL 117.9(1), plaintiffs' assertion that the ratifiers of Michigan's constitution intended the phrase "district or territory affected" in Const 1963, art 2, § 6 to mean "the entirety of a township whose boundaries were proposed to be changed" fails. Instead, we must conclude that the ratifiers were aware of the terms' distinct meanings and intentionally used the

[1] At the time the constitution was ratified in 1963, MCL 117.9(1) stated, in pertinent part: "The district to be affected by every such proposed incorporation, consolidation or change of boundaries shall be deemed to include the whole of each city, village or township from which territory is to be taken or to which territory is to be annexed[.]"

phrase "district *or* territory affected" (emphasis added). "The literal meanings of the terms 'and' and 'or' should be followed if they do not render the statute [or constitutional provision] dubious." *White v Harrison-White*, 280 Mich App 383, 389; 760 NW2d 691 (2008). The ratifiers' use of the term "or" in Const 1963, art 2, § 6 allows the Legislature to limit the electors permitted to vote on a proposed annexation to those in the territory affected, i.e., the portion of the township to be annexed.

Plaintiffs argue that MCL 42.34(5) violates not only Const 1963, art 2, § 6, but the "liberally conferred" right to vote in Const 1963, art 2, § 1 as well. But the right to vote is not unfettered. As our Supreme Court explained in *In re 2005 PA 71*, 479 Mich at 16, "[T]he right to vote is an implicit fundamental political right that is preservative of all rights. . . . [A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. However, [the] equal right to vote is not absolute . . . ." (Citations and quotation marks omitted.) For example, "[b]alanced against a citizen's 'right to vote' are the constitutional commands given by the people of Michigan to the Legislature in Const 1963, art 2, § 4," to " 'regulate the time, place and manner of all nominations and elections,' " " 'preserve the purity of elections,' " " 'preserve the secrecy of the ballot,' " " 'guard against abuses of the elective franchise,' " and " 'provide for a system of voter registration and absentee voting.' " *In re 2005 PA 71*, 479 Mich at 16-17 (emphasis omitted).

In regard to annexations, in *Midland Twp*, 401 Mich at 664, our Supreme Court stated that the "Legislature is free to change city, village and township boundaries at will," and, pursuant to the United States Supreme Court's decision in *Hunter v Pittsburgh*, 207 US 161; 28

S Ct 40; 52 L Ed 151 (1907), that the Legislature could constitutionally change such boundaries without an election. Our Supreme Court further explained in *Shelby Charter Twp v State Boundary Comm*, 425 Mich 50, 56 n 3; 387 NW2d 792 (1986):

> The fixing of municipal boundaries is generally considered to be a legislative function. In this State the power vested in the legislature to provide for incorporation of cities and villages is in no way limited by Constitution (art 8, §§ 20, 21) (home rule amendment), and the power conferred on the legislature by the Constitution (art 8, § 20) to provide by general law for incorporation of cities and villages includes change of boundaries when needed. In the absence of constitutional inhibition the legislature may submit the determination of boundaries to courts, or to municipal authorities, or to the qualified electors.
>
> The changing of the boundaries of political divisions is a legislative question, and the power to annex territory to municipalities has often been delegated to boards of supervisors or other public bodies. [Citations omitted.]

Given that the fixing of municipal boundaries is a legislative function and the Legislature is permitted to change such boundaries at will, with or without the consent of the electorate, it is constitutionally permissible for the Legislature to allow only qualified, registered electors living in the portion of the township to be annexed to vote on a proposed annexation. MCL 42.34(5) does not violate plaintiffs' right to vote under Const 1963, art 2, § 1.

B. EQUAL PROTECTION GUARANTEES

Plaintiffs next argue that by permitting only qualified, registered electors living in the portion of the township to be annexed to vote on a proposed annexation, MCL 42.34(5) violates constitutional equal protection guarantees. According to plaintiffs, because a

successful annexation would affect the entirety of the township, there is no rational basis for prohibiting some of the township's residents—those residing outside the portion of the township to be annexed—from voting on a proposed annexation.

In *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 31-32; 654 NW2d 610 (2002) (citations omitted), this Court stated:

> We note initially with respect to the township's equal protection argument that the township has failed to demonstrate that it or its residents possessed a property or liberty interest that was affected by the annexation of charter township property pursuant to MCL 42.34(5). "No city, village, township or person has any vested right or legally protected interest in the boundaries of such governmental units." " 'The fixing of municipal boundaries is generally considered to be a legislative function.' "
>
> Moreover, the annexation referendum provisions within MCL 42.34(5) further a legitimate governmental interest and rationally relate to achieving the interest. In *Midland Twp*, *supra* at 666, the Supreme Court considered a township's assertion that "it is violative of the Equal Protection Clause to provide for a referendum where more than 100 persons reside in the territory to be annexed and deny a referendum where 100 persons or fewer reside in the territory." The Supreme Court rejected the equal protection claim on the basis that "the challenged classification bears a substantial relation to the object of the legislation: providing a means appropriate to the resolution of disagreements concerning annexation of territory to a city." We find that the same rational purpose supports the Legislature's decision to permit within MCL 42.34(5) annexation of charter township property by separate majority votes of the qualified and registered electors living within the annexation area and eligible voters residing in the annexing city or village.[12]

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[12] . . . The final version of the provision that became current subsection 34(5) represented a legislative compro-

> mise between an interest in protecting charter townships from annexations and the competing concerns, among others, that "such a strong shield against annexations was not good public policy" and that the initial version of what became subsection 34(5), "essentially gave charter townships a veto power over all annexations of their territory, even in cases in which the majority of electors in the city seeking to annex, and in the territory proposed to be annexed, voted in favor of the annexation." The legislative history chronicled in *Shelby Charter Twp*, *supra* at 61-69, supports our conclusion that MCL 42.34(5) represents "a means appropriate to the resolution of disagreements concerning annexation of territory to a city."

Pursuant to this Court's conclusion in *Bloomfield Charter Twp*, that MCL 42.34(5) furthers a legitimate governmental interest and the classification imposed by the statute rationally relates to achieving that interest, plaintiffs' equal protection claim fails.

C. RESIDENCY REQUIREMENTS

Plaintiffs argue that MCL 42.34(5) imposes on electors a residency requirement not constitutionally imposed and delegates the Legislature's responsibility to determine residency for voting purposes to the private individuals seeking annexation. We disagree. Const 1963, art 2, § 1 states that the "legislature shall define residence for voting purposes." The Legislature has met this burden by enacting MCL 168.10, which defines a "qualified elector" as "any person who possesses the qualifications of an elector as prescribed in section 1 of article 2 of the state constitution and who has resided in the city or township 30 days." The Legislature has also defined "residence," which "for registration and voting purposes means that place at which a person habitually sleeps, keeps his or her personal effects and has a regular place of lodging." MCL 168.11(1). In MCL

42.34(5), the Legislature addressed annexation questions in particular, stating that "a majority of the qualified and registered electors voting on the question in the city or village to which the portion is to be annexed, and the portion of the township which is to be annexed," must approve a proposed annexation. This provision does not impose a residency requirement that the Legislature was not authorized to impose. Further, while MCL 42.34(5) requires a petition "signed by 20% of the registered electors in the area to be annexed" to be filed with the county clerk, the statute does not permit the petitioners to "define residence for voting purposes." The petitioners simply define the area to be annexed and, pursuant to the Legislature's directive in MCL 42.34(5), any qualified and registered electors in that area may vote on the proposed annexation.

IV. BRYANTON'S ALLEGED VIOLATIONS OF THE MICHIGAN ELECTION LAW

Plaintiffs further argue that Bryanton violated MCL 168.643a and 168.646a(2) by failing to adopt ballot language that clearly identified the property to be annexed and to properly certify the ballot language. Again, we disagree.

A. CERTIFYING THE BALLOT LANGUAGE

Defendants assert, and plaintiffs concede, that the annexation petition at issue was filed pursuant to § 34 of the CTA, MCL 42.34. Defendants further assert, and we agree, that Bryanton complied with the CTA's requirements for determining the validity of the annexation petition and ordering a referendum on the question of the annexation. MCL 42.34(6) provides:

> If a petition is filed as provided in subsection (5), the county clerk, after determining the validity of the petition,

> shall order a referendum on the question of annexation. This referendum shall occur within 1 year after the validation of the petitions. The referendum shall be held at the first primary or general election held in that county not less than 60 days after the validation of the petition, or in compliance with the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992.

Bryanton received the annexation petition on August 10, 2006. In a letter dated September 8, 2006, Bryanton informed the Meridian Township Clerk and East Lansing City Clerk that he had found the petition to be valid. Bryanton further stated that he had ordered a referendum on the question of the annexation at the general election scheduled for November 7, 2006, 60 days later. In determining the validity of the annexation petition and ordering a referendum at the next general election "not less than 60 days after the validation," Bryanton complied with the requirements of MCL 42.34(6).

Plaintiffs argue, however, that Bryanton violated MCL 168.646a(2), a subsection of the Michigan Election Law, MCL 168.1 *et seq*., by failing to certify the ballot language at least 70 days before the election. MCL 168.646a(2) provides:

> If a local, school district, or county ballot question is to be voted on at a regular election date or special election, the ballot wording of the ballot question shall be certified to the local or county clerk at least 70 days before the election. If the wording is certified to a clerk other than the county clerk, the clerk shall certify the ballot wording to the county clerk at least 68 days before the election. Petitions to place a county or local ballot question on the ballot at the election shall be filed with the clerk at least 14 days before the date the ballot wording must be certified to the local clerk.

While we agree with plaintiffs that Bryanton failed to comply with the certification procedure outlined in MCL 168.646a(2), we are not persuaded that he was

required to do so. MCL 42.34(6) specifically states that "[t]he referendum shall be held at the first primary or general election held in that county not less than 60 days after the validation of the petition, *or* in compliance with the Michigan election law" (emphasis added). Plaintiffs suggest that Bryanton was required to comply with both MCL 42.34(6) *and* MCL 168.646a(2), and that the "final phrase of MCL 42.34(6), 'or in compliance with [the] Michigan election law,' was only intended to address situations where the provisions of the [CTA] and the provisions of [the] Michigan election law cannot be simultaneously satisfied." But we agree with the trial court that the term "or" in MCL 42.34(6) must not be read to mean "and." While it is true that misuse of the conjunction "or" "has infected statutory enactments," *People v Gatski*, 260 Mich App 360, 365; 677 NW2d 357 (2004), as previously indicated, "[t]he literal meanings of the terms 'and' and 'or' should be followed if they do not render the statute dubious," *White*, 280 Mich App at 389. Adhering to the literal meaning of the term "or" in MCL 42.34(6) does not render the statute dubious. Where statutory language is clear and unambiguous, it must be enforced as written. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

Plaintiffs also suggest that Bryanton was required to comply with MCL 168.646a(2) pursuant to MCL 168.646a(3), which states: "The provisions of this section apply notwithstanding any provisions of law or charter to the contrary . . . ." To the extent that there is a legitimate conflict between MCL 168.646a and MCL 42.34(6), we must conclude that the more specific statute controls. When two provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific provision controls. *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008). "The specific statute is treated as an excep-

tion to the general one." *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997). While the Michigan Election Law, specifically MCL 168.646a(2), provides certification procedures for ballot proposals in general, the CTA contains provisions specific to annexations by petition and referendum. Accordingly, MCL 42.34(6) controls. Cf. *Bloomfield Twp*, 253 Mich App at 28-29 (holding that MCL 42.34[5] controls over MCL 168.482[4]).

B. IDENTIFYING THE PROPERTY TO BE ANNEXED

Finally, plaintiffs argue that Bryanton violated MCL 168.643a by failing to adopt ballot language that clearly identified the property to be annexed. MCL 168.643a provides:

> A question submitted to the electors of this state or the electors of a subdivision of this state shall, to the extent that it will not confuse the electorate, be worded so that a "yes" vote will be a vote in favor of the subject matter of the proposal or issue and a "no" vote will be a vote against the subject matter of the proposal or issue. The question shall be worded so as to apprise the voters of the subject matter of the proposal or issue, but need not be legally precise. The question shall be clearly written using words that have a common everyday meaning to the general public. The language used shall not create prejudice for or against the issue or proposal.

Plaintiffs assert that Bryanton "utilized inherently confusing ballot language" and "failed to include a map, commonly understood points of geographic reference, addresses, or adjacent streets" that would have clarified the property to be annexed. We agree with plaintiffs that the general public may not have easily understood some of the ballot language, specifically the legal description of the property. Nevertheless, we conclude that the ballot language, viewed in its entirety, was

sufficient to apprise voters of the subject matter of the proposal. "The main objective of the question on the ballot is to generally apprise the voters of the subject matter." *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 90; 340 NW2d 817 (1983). Here, the question posed on the ballot was: "SHALL THE FOLLOWING DESCRIBED PROPERTY LOCATED IN THE CHARTER TOWNSHIP OF MERIDIAN BE ANNEXED TO THE CITY OF EAST LANSING?" The ballot further stated that the property was comprised of 6.33 acres of land in Elmdale subdivision adjacent to Taylor's Acres subdivision and Lake Lansing Road. In posing the question on the ballot and thus describing the property to be annexed, Bryanton utilized "clearly written . . . words that have a common everyday meaning to the general public" and successfully apprised voters of the general subject matter of the proposal. MCL 168.643a; *Advisory Opinion*, *supra*.

Moreover, even if the ballot language was potentially confusing, there is no indication in the record that any voters were actually confused or misled by the language. On October 25, 2006, approximately two weeks before the election, the East Lansing City Clerk published a summary of the ballot proposal, along with a map of the property to be annexed, in a local newspaper of general circulation. Furthermore, as plaintiffs have conceded, of the two electors in Meridian Township permitted to vote on the annexation, one was the petitioner who initiated the annexation and the other resided with the petitioner. We echo the trial court's statement that [i]t is impossible to believe that these two individuals were inadequately apprised of the subject matter of the annexation referendum." Thus, any violation of MCL 168.643a was harmless.

Affirmed.

LAMONT COMMUNITY CHURCH v
LAMONT CHRISTIAN REFORMED CHURCH

Docket No. 283154. Submitted September 9, 2009, at Grand Rapids. Decided September 22, 2009, at 9:05 a.m.

Lamont Community Church (LCC) brought an action in the Ottawa Circuit Court seeking a declaratory judgment quieting title to property that had been owned by Lamont Christian Reformed Church (LCRC) through the Lamont Christian Reformed Church Property Corporation, an entity the LCRC had created in 1998. LCC, which was formed in 2005 by departing members of the LCRC, asserted that it was entitled to the church property because the LCC constituted a majority of the confessing members of the LCRC. The LCRC filed a counterclaim denying this assertion and seeking a declaratory judgment that the LCRC was the owner of the property, arguing that the Zeeland Classis, the regional assembly of churches to which the LCRC belongs, had already determined that the LCRC was the owner. Accordingly, because the denomination with which the LCRC is affiliated, the Christian Reformed Church in North America (CRCNA), is organized in a hierarchical rather than congregational manner, the LCRC argued that the trial court was required to defer to the Zeeland Classis's determination of ownership. Both parties moved for summary disposition, and the LCC moved to disqualify the law firm of Clark Hill as defendants' counsel. The court, Edward R. Post, J., initially ruled that there was a genuine issue of material fact regarding whether the CRCNA was structured hierarchically with respect to property matters. However, after a hearing on a motion for reconsideration at which the court considered testimony regarding matters of church polity, it ultimately ruled that the denomination was hierarchical with respect to property matters and that the court's only role was to give effect to the ruling of the Zeeland Classis. After this ruling, the property corporation transferred the church property back to the LCRC and was dissolved. The trial court then issued an order quieting title in the LCRC. The LCC appealed.

The Court of Appeals *held*:

1. The trial court did not err by failing to disqualify Stephen Turner or the law firm for which he worked, Clark Hill, from representing the LCRC because the LCC was never a client of

Clark Hill attorney Roger Swets, who had drafted some documents for the LCRC, or of Clark Hill itself. Accordingly, the Michigan Rules of Professional Conduct relating to conflicts of interest were not implicated.

2. The trial court had jurisdiction to determine whether the CRCNA was hierarchical or congregational. A determination that a religious organization is hierarchical does not divest trial courts of jurisdiction; rather, under the ecclesiastical abstention doctrine, it requires civil courts to resolve issues related to the religious polity in a manner that is consistent with determinations made by the highest body of the religious organization when entering a judgment.

3. The trial court correctly determined that the CRCNA was hierarchical with respect to property, although it erred by considering testimony regarding the CRCNA rather than relying solely on the relevant governing documents. A denomination is considered hierarchical when it has a central governing body that has regularly acted within its powers, and congregational when the governing powers and property ownership remain in the individual churches. The model articles of incorporation applicable to churches within the CRCNA grant authority to the class's to determine property disputes, with those determinations appealable to the synod. This is clear evidence that the CRCNA is hierarchical with respect to property ownership.

4. The trial court properly used the hierarchical method to resolve the property dispute rather than applying neutral principles of law. Under Michigan law, courts should use the hierarchical method unless it appears that there is an express trust in favor of one of the parties. Contrary to the LCC's argument, there is no express trust in favor of the property corporation that the LCRC created because the Zeeland Classis had already determined that the LCRC did not have the authority to create the corporation or to transfer church property to it without consent from the Zeeland Classis, which it did not have.

5. The trial court's rulings regarding the fact and timing of disaffiliation were consistent with those of the Zeeland Classis and therefore must be affirmed.

6. The fact that the Zeeland Classis failed to discover that the church property had been transferred from the LCRC to the property corporation that the LCRC created in 1998 does not estop the CRCNA from exerting its authority to determine property disputes.

Affirmed.

1. RELIGIOUS CORPORATIONS AND ASSOCIATIONS — JURISDICTION — ECCLESIASTICAL ABSTENTION DOCTRINE.

A determination that a religious organization is organized in a hierarchical structure does not divest trial courts of jurisdiction; rather, under the ecclesiastical abstention doctrine, it requires civil courts to resolve issues related to the religious polity in a manner that is consistent with determinations made by the highest body of the religious organization when entering a judgment.

2. RELIGIOUS CORPORATIONS AND ASSOCIATIONS — CHURCH PROPERTY — ORGANIZATIONAL STRUCTURE.

A denomination is considered hierarchical when it has a central governing body that has regularly acted within its powers and congregational when the governing powers and property ownership remain in the individual churches.

Cunningham Dalman, P.C. (by *Andrew J. Mulder* and *P. Haans Mulder*), for the plaintiff.

Clark Hill PLC (by *Stephen D. Turner* and *Gregory N. Longworth*) for the defendants.

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM. This property dispute arises from a congregational dispute among members of defendant Lamont Christian Reformed Church (LCRC) that resulted in certain members leaving and forming plaintiff Lamont Community Church (LCC). Both LCRC and LCC claimed ownership of the church property. LCC appeals as of right a judgment quieting title in LCRC. We affirm.

I. BACKGROUND AND PROCEEDINGS

LCRC is affiliated with and a part of the Christian Reformed Church in North America (CRCNA or the Denomination). The governing document for CRCNA is

the Church Order. Pursuant to the Church Order, there are three assemblies of the Denomination: the council, the classis, and the synod. A council is made up of members of a congregation and manages the affairs of the individual church. A classis is a regional assembly of "neighboring churches" that oversees the congregations in its region and handles appeals from council decisions. Although appealable to synod, decisions made by classis are binding on the councils in the region when left unappealed, or unless and until the synod overrules them. The synod convenes annually and is made up of representatives from each regional classis. Decisions of synod are binding on all classes and councils in the Denomination, but may be appealed to the next synod.

LCRC was originally incorporated in 1880, but when its articles of incorporation terminated in 1902, LCRC reincorporated under 1901 PA 148 (MCL 458.421 *et seq*.), a statute adopted for the incorporation of Christian Reformed Churches. LCRC is a member of defendant Zeeland Classis.[1] The church property was acquired by LCRC in 1959. LCRC restated and amended its articles of incorporation in 1993.

In 1998, LCRC created defendant Lamont Christian Reformed Church Property Corporation (the Property Corporation) to hold the church property separate from LCRC so that if LCRC decided to leave the Denomination, it could do so and retain the church property. The Property Corporation was purposely made nondenominational. After the church property was transferred from LCRC to the Property Corporation, LCRC began to look into affiliating itself with the United Reform Church and, on September 15, 2004, LCRC's consistory

[1] Although Zeeland Classis was a defendant at the trial court level, it is not present on appeal.

approved the committee report that had been submitted for leaving the Denomination.

That same month, LCRC's pastor, Rev. Richard Terpstra, was involved in an accident and criminally charged with driving under the influence, to which he ultimately pleaded guilty. Around that same time, it came to light that, in 2003, Terpstra had been charged with indecent exposure, to which he entered a no-contest plea to a lesser charge of obscene and disorderly conduct. In light of these and certain other events, LCRC's decision to leave the Denomination was placed on hold.

In December 2004, LCRC suspended Terpstra from his duties and directed him to go to counseling, informing Zeeland Classis of its decision. In March 2005, when LCRC's consistory reinstated Terpstra, several members complained to the consistory about the reinstatement. Although LCRC's consistory was supposed to respond to the complaint, it chose to do nothing, sending a letter to Zeeland Classis indicating that it was not taking any action on the congregants' complaints. The members appealed the consistory's failure to take action to Zeeland Classis, which ultimately reinstated Terpstra's suspension and deposed him from the ministry. This decision was not appealed, and it was stipulated that Zeeland Classis had the authority to undertake this appeal and enact discipline against Terpstra, including reinstating his suspension and deposing him.

As a result of Zeeland Classis reinstating Terpstra's suspension, there were consistory meetings during which church elders discussed the possibility of leaving LCRC and going to another church. Shortly thereafter, a number of people announced they were leaving LCRC, but did not contact Zeeland Classis to consult regarding disaffiliation. On October 30, 2005, 132 signatures were obtained as "signatures of commitment" to an un-

named new congregation. In late November 2005, LCC transmitted articles of incorporation to the state, which were filed on December 2, 2005.

Sometime thereafter, LCC demanded that LCRC turn over the church property. Members of LCRC involved Zeeland Classis in the matter by requesting its assistance in the property dispute. The interim committee of Zeeland Classis, which handles all matters that occur between its three yearly meetings, met with representatives of LCRC and rendered a decision regarding property distribution. The committee determined that all rights in the church property belonged to LCRC, concluding that the members of LCC had disaffiliated from LCRC without following the appropriate disaffiliation procedures. It also noted that the articles of incorporation for the Property Corporation "clearly state that its purpose is to preserve all property rights for the Lamont CRC" and that LCRC continued to exist. The decision further stated that LCRC had failed to consult with Zeeland Classis when it created the Property Corporation and transferred the church property to it and that, if it had, Zeeland Classis would have ruled against permitting LCRC to do so. The committee concluded that the withdrawal from LCRC and the creation of LCC by the "disaffiliated members" was not a response to any doctrinal matter, but a reflection of their disagreement with the decision to depose Terpstra and noted that these members had failed to appeal the decision to synod in conformance with the Church Order. According to the committee, LCC "spurned any and all attempts of the Lamont CRC to work toward reconciliation of their differences" and "[s]ome of the disaffected members [] engaged in unchristian behavior." The committee determined that "by the provisions of the Church Order, the decisions of the Synod of CRCNA, and the unchristian actions of the disaffected

group, that the Lamont Christian Reformed Church is the continuing, legitimate church, and therefore the rightful agent of the church's property." The decision of the interim committee was voted on and approved by the entire body of Zeeland Classis at its May 17, 2006, meeting. There was no appeal to synod.

LCC filed a complaint requesting, among other things, a declaratory judgment that LCC was the owner of the church property, asserting that it was made up of a "majority of the confessing members of the Lamont Christian Reformed Church" and that decisions of the Property Corporation were not subject to review by any denomination, such that, pursuant to the bylaws of the Property Corporation, it was entitled to the church property. Defendants denied that LCC constituted a majority of the professing members of LCRC[2] and filed a counterclaim seeking a declaratory judgment that LCRC was the owner of the church property based on the hierarchical nature of the Denomination. LCC moved for partial summary disposition of LCRC's counterclaim for declaratory judgment. Defendants responded that given the hierarchical nature of CRCNA and Zeeland Classis's determination that LCRC was the owner of the property, under Michigan law, the trial court was required to accept that decision.

LCC also moved to disqualify the law firm of Clark Hill as defendants' counsel. LCC's counsel sent a letter to Roger Swets indicating that he was surprised Swets was representing LCRC because "[i]f the Court determines that the Articles of Incorporation, Bylaws, and Lease are ambiguous and required testimony from the 'scrivener' of the documents, it seems inevitable that

[2] LCC has admitted that the counting process to determine which congregation contained the majority of the professing members has not yet occurred.

you will be a witness to testify regarding the drafting and intent of the Articles of Incorporation, Bylaws, and Lease." LCRC's counsel, Stephen Turner, responded to the letter, indicating that both he and Swets were representing LCRC and that, in the event of litigation, Turner "will be taking the lead." Turner disagreed that Clark Hill was ethically barred from representing LCRC under the Michigan Rules of Professional Conduct (MRPC). The trial court denied LCC's motion to disqualify, concluding that it was clear that only LCRC and the Property Corporation had been Swets's clients and that neither LCC nor the individual members of LCRC were clients.

The trial court considered cross-motions for summary disposition. LCC argued that its requested relief was a declaration of ownership to property that was clearly a request for the equitable jurisdiction of Michigan civil courts. LCC noted that there were two approaches to church property disputes recognized by the United States Supreme Court: the hierarchical/polity approach and the neutral principles of law approach. LCC maintained that it should prevail under either standard because under the hierarchical approach, although CRCNA was previously held to be hierarchical by Michigan courts, it had changed over time to become congregational with respect to property ownership. Under the neutral principles of law approach, there was an express trust provision in the bylaws of the Property Corporation, and the Church Order as it existed at the time of the creation of the Property Corporation did not prohibit that transfer.

Defendants argued that, as a matter of law, the appropriate test is the hierarchical rule rather than the neutral principles of law approach, and that Zeeland Classis had already determined that LCRC was entitled

to the property with no appeal of the issue to synod. LCRC stated that the fundamental question before the trial court was whether the polity of the Church Order trumped the civil documents establishing the Property Corporation and whether the CRCNA had the ultimate right and power to decide the control and ownership of the property. LCRC believed that CRCNA did have that right based on caselaw establishing that CRCNA was hierarchical.

The trial court noted that the record of title did not contain a reversionary interest to CRCNA and that CRCNA was not a grantee in the deed and asked what the legal nature of CRCNA's interest in the property was. Defendants argued that CRCNA did not own the property, but rather, as a hierarchical denomination, CRCNA had the right to determine who owned the property and the structure of that ownership. The trial court framed the issue as whether, when the church property was transferred to the Property Corporation in 1998, LCRC had the authority to do that free and clear of any interest on behalf of CRCNA. LCC argued that because the Property Corporation was nondenominationally affiliated, there was no way that CRCNA had any authority to review the transfer of the property.

The trial court ruled that CRCNA was clearly hierarchical with respect to doctrinal and spiritual matters, but it was unclear whether it was also hierarchical with respect to property matters. It concluded that there was a genuine issue of material fact "regarding the structure of governance within the CRCNA for church property disputes." It further ruled that, as a matter of law, if CRCNA was hierarchical, it would defer to the Denomination to decide the dispute because Michigan had adopted the hierarchical theory as the preferred approach.

In response to a motion for reconsideration filed by plaintiff, the trial court issued another opinion, concluding that "1) a church's authority to resolve church disputes is jurisdictional in nature, 2) jurisdiction is a legal issue and that issues of law must be decided by a judge, and 3) the core claims in this case are equitable in nature and as a result, are for the Court to decide." It ordered a factual hearing at which time it, not a jury, would decide the "jurisdiction"[3] of the case and withheld further determination of the ownership issue until after completion of the factual hearing. At the "jurisdictional" hearing, the parties stipulated that Swets's presence as a witness was unnecessary. The sole issue before the trial court was whether CRCNA was hierarchical or congregational with respect to holding property.

The trial court heard testimony from Henry DeMoor, a former pastor and current professor of church polity and vice president for academic affairs at Calvin Theological Seminary;[4] Stanley Zemaitis, a member of LCRC and former vice president of its consistory during the time of the property transfer; Dale Grooters, another member of LCRC who served on the consistory during 1997 and 1998; Lloyd Lunceford, an attorney from Louisiana who had engaged in theological coursework in a non-degree program and whose law practice focuses on ecclesiastical law or church property law; Ronald Meyer, pastor of Drenth Christian Reformed Church, a member church of CRCNA, and stated clerk for Zeeland Classis; and Peter Borgdorff, former executive director of CRCNA.

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[3] We place this term in quotation marks because, as discussed below, it is a misnomer.

[4] Calvin Theological Seminary is the only seminary owned by CRCNA.

The trial court ultimately issued a written opinion. It began by noting that whether a church was hierarchical or congregational was a question of fact. It considered the Michigan Supreme Court's previous declaration that CRCNA was hierarchical, but determined that subsequent caselaw had indicated that a denomination could be hierarchical with respect to spiritual matters, but congregational with respect to ownership of property, thus requiring the court to determine whether CRCNA was hierarchical or denominational with respect to the ownership of real property. After reviewing a history of both the Denomination and LCRC and the actions of each, it arrived at "[t]he inescapable conclusion [] that the Denomination is hierarchical as to the ownership of real property" because of "the nature and extent of the power over congregational activities vested in the broader bodies of Classis and Synod." It was "convinced that Classis has full authority to nullify any decision made by any council," that Zeeland Classis could have prevented the transfer of the church property had it been made aware, and that Zeeland Classis could have ordered the council members who formed the majority of the board of directors of the Property Corporation to transfer the church property back to LCRC.[5] Accordingly, the trial court's only role was "to give effect to the rulings of Classis and Synod." It dismissed plaintiff's complaint, but retained jurisdiction to "implement civil law remedies necessary to effectuate the ruling of Classis and to quiet title to the church real estate."

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[5] The trial court did note that had the church property been sold to a bona fide purchaser for value, the outcome would have been different, but that because the Property Corporation was "a mere instrumentality" of LCRC and controlled by members of LCRC, the Property Corporation was not a bona fide purchaser for value.

A dispute ensued over what orders needed to be entered and whether title had to be quieted for an appeal to be taken. During this time, the Property Corporation transferred the church property back to LCRC and the Property Corporation was dissolved. After this Court dismissed two appeals for lack of jurisdiction, the trial court quieted title to the church property in LCRC, but ruled that during the appeal LCRC could not sell or further encumber the property without an order from the court and that LCC did not have to post an appeal bond. LCC then filed the instant appeal.

II. ATTORNEY DISQUALIFICATION

We first address LCC's claim that the trial court erred by failing to disqualify the law firm of Clark Hill from representing defendants in this matter. We review the factual question of the existence of a conflict of interest that disqualifies counsel for clear error, but review de novo the application of "ethical norms" to a decision whether to disqualify counsel. *Avink v SMG*, 282 Mich App 110, 116; 761 NW2d 826 (2009). Factual findings are clearly erroneous only if this Court is "left with a definite and firm conviction that a mistake was made." *Id.*

LCC maintains that it was a prior client of Swets and that Clark Hill and Turner therefore were precluded from representing defendants in this matter. We disagree. LCC initially argued that Turner was precluded from representing defendants under MRPC 3.7 because Swets was going to be a necessary witness and Turner was a member of the same firm. MRPC 3.7(b) provides, "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7

or Rule 1.9." MRPC 1.7(a) and 1.9 prohibit the representation of a client where that representation is directly or materially adverse to another client or former client.

We find both of these rules inapplicable, however, because LCC was never a client of either Swets or Clark Hill. Indeed, when a member of LCC asked Swets to represent LCC, Swets replied that he was precluded from doing so because he previously represented LCRC. Under MRPC 1.13, lawyers "employed or retained to represent an organization represent[] the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents." It is undisputed that LCRC and the Property Corporation are both clients of Swets and Clark Hill. LCC attempts to bootstrap itself into the position of client by arguing that because the stated purpose of the Property Corporation is to carry out the purposes of LCRC or "any church formed by a majority of the members" of LCRC, LCC as that entity is also a client of Swets. What this argument fails to register is that LCC is a separate organization, distinct from either LCRC or the Property Corporation, and neither Swets nor Clark Hill has ever represented the entity LCC. It makes no difference whether LCC is a church formed by a majority of the members of LCRC (a fact that remains in dispute given that LCC conceded a count had not taken place). Corporations exist for the benefit of many groups of people, including other companies or their own shareholders. However, that does not make those groups or shareholders clients of the attorneys who represent the corporations themselves. This is the crux of MRPC 1.13. Because LCC is neither a current nor former client of either Swets or Clark Hill, MRPC 1.7 and 1.9 are not implicated, and MRPC 3.7 permitted Turner to repre-

sent defendants. We hold that the trial court properly declined to disqualify either Turner or Clark Hill.

III. JURISDICTION

LCC next argues that the trial court erred by concluding that whether the Denomination was hierarchical or congregational was a question of fact. LCC contends that whether a church is hierarchical or congregational is a question of jurisdiction, which is a legal issue, and caselaw is clear that trial courts are vested with the jurisdiction to determine property disputes. We conclude that LCC has, understandably, confused the legal question of jurisdiction with the factual question of whether a church is hierarchical or congregational.

Plaintiff is correct that jurisdiction is a legal issue. *Todd v Dep't of Corrections*, 232 Mich App 623, 627; 591 NW2d 375 (1998). Plaintiff is also correct that civil courts have the general authority to resolve church property disputes. *Bennison v Sharp*, 121 Mich App 705, 712; 329 NW2d 466 (1982).

> The First Amendment, however, "severely circumscribes the role that civil courts may play in resolving church property disputes" by prohibiting civil courts from resolving church property disputes on the basis of religious doctrine and practice and requiring that courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. [*Id.* at 712-713, quoting *Jones v Wolf*, 443 US 595, 602; 99 S Ct 3020; 61 L Ed 2d 775 (1979).]

The determination of whether a denomination is hierarchical is a factual question. See *Calvary Presbyterian Church v Presbytery of Lake Huron of the United Presbyterian Church*, 148 Mich App 105, 113; 384 NW2d 92 (1986) (holding that "the trial court correctly

found that the Denomination is hierarchical"); *Bennison*, *supra* at 718 (holding that "the undisputed facts show the Protestant Episcopal Church to be hierarchical").

The difficulty is that certain opinions of this Court conclude that when a church is hierarchical, civil courts lack "subject matter jurisdiction."[6] This characterization is a misnomer, as it would preclude trial courts from entering enforceable judgments, leaving parties who are attempting to enforce their rights as determined by a hierarchical denomination without a remedy. A determination that an organization is hierarchical does not divest trial courts of jurisdiction. Rather, it results in what our Supreme Court has referred to as an "ecclesiastical abstention doctrine." *Smith v Calvary Christian Church*, 462 Mich 679, 684; 614 NW2d 590 (2000). The doctrine recognizes that where the facts indicate that a denomination is hierarchical, "civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to the government of the religious polity," *id.* (quotation marks and citation omitted), but must defer to the resolution of those issues "by the highest court of a hierarchical church organization," *Bennison*, *supra* at 713. Thus, when a denomination is determined to be hierarchical, trial courts have jurisdiction to enter a judgment, but the judgment must resolve the matter consistent with any determinations already made by the denomination. Because this is precisely what the trial court did in this case, we find no error.

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[6] For example, in *Leach v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2009 (Docket No. 283626), a panel of this Court concluded that "the trial court did not err when it determined that Assemblies of God is a hierarchical organization, thus precluding subject matter jurisdiction." *Id.* at 5.

IV. HIERARCHICAL/CONGREGATIONAL

LCC next argues that the trial court erred when it determined that CRCNA was a hierarchical denomination, rather than congregational in nature, with respect to property.

As an initial matter, we note that much of the testimony went well beyond anything the trial court should have considered. The United States Supreme Court has held that it is a violation of the First and Fourteenth amendments for courts to substitute their own interpretation of a denomination's constitution "for that of the highest ecclesiastical tribunals in which the church law vests authority to make that interpretation." *Serbian Eastern Orthodox Diocese v Milivojevich*, 426 US 696, 721; 96 S Ct 2372; 49 L Ed 2d 151 (1976). Where a denomination's constitutional provisions are "not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity," *id*. at 723, courts must accept the interpretation provided by the denomination and "not delve into the various church constitutional provisions relevant to this conclusion," *id*. at 721. Here, the trial court ran afoul of this rule. The question was whether CRCNA was hierarchical with respect to property. That decision had to be based on the language of the Church Order and other governing documents. To the extent that the Church Order was unclear in that regard, the trial court was required to accept any interpretation made by the highest governing body permitted to make that decision. *Id*. Instead, the parties elicited testimony on when certain provisions of the Church Order took effect, whether CRCNA followed its own procedures on policy implementation, whether certain provisions were mandatory, whether a disaffiliation occurred, and whether

the disaffiliation procedure was applicable, all of which are matters of church polity.[7] Thus, the hearing devolved into an impermissible "searching" inquiry into the polity of CRCNA in an effort to properly construe the various provisions of the Church Order. In an effort not to repeat the error, see *id.*, we have not relied on the testimony from the hearing, but have relied on the documents themselves for our determination.[8]

"[A] denomination is organized in a hierarchical structure [when it has] a central governing body which has regularly acted within its powers" while "the looser 'congregational' structure" generally has "all governing powers and property ownership remaining in the individual churches." *Calvary Presbyterian Church*, *supra* at 108 n 1. The parties agree that CRCNA has a presbyterial form of government. This concession by itself seems to belie LCC's argument that CRCNA is congregational, as Michigan caselaw defines presbyterial as the opposite of congregational. See, e.g., *id.* at 113 ("[T]he trial court correctly found that the Denomination is hierarchical even though it possesses a representative form of government, that the decisions of that

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[7] Particularly troubling is the testimony that clearly entered into religious matters. For example, Lunceford testified regarding his review of "the Belgic Confession, [t]he Canons of Dordt and the Heidelberg Catechism" and which provisions he found germane to what the Denomination considered an ecclesiastical matter. DeMoor testified that article 27 of the Church Order "says that the ecclesiastical authority entrusted to the church is entrusted to the Church by Christ" and that because the synod is the typification of Christ, it has control over everything and agreed that CRCNA and the synod "can justify anything under Article 27 because they have the power of Christ."

[8] In this regard, we agree with plaintiff that the trial court should not have accepted the testimony that "recommend" really meant "required." In *Jones*, *supra* at 604, the United States Supreme Court held that "a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining" the intent of the document.

government (here, the Presbytery) are not reviewable by the state and thus the decision of the Denomination to retain the real estate upon the withdrawal of the Church is binding upon the counts [sic: courts]."); *Second Protestant Reformed Church of Grand Rapids v Blankespoor*, 350 Mich 347, 350; 86 NW2d 301 (1957) (concluding that the question is whether the Protestant Reformed Churches of America "is congregational or presbyterian"); *Borgman v Bultema*, 213 Mich 684, 690; 182 NW 91 (1921) (determining whether the CRCNA had "the presbyterial form of government, as contradistinguished from [the] congregational form of government"). Indeed, in *Borgman*, the Michigan Supreme Court adopted verbatim the trial court's ruling that the CRCNA was hierarchical:

> "As I understand defendants' theory it is that the classis and synod may act in an advisory capacity to the consistory, but that in case their advice is disregarded they are powerless, to enforce their authority over the local church.
>
> "I cannot agree with defendants' contention in this regard. I do not see how any one could read the 86 articles of the church order of the Christian Reformed Church, which is the supreme law or constitution of the church, without coming to the conclusion that this religious denomination is much more than a federation of churches. In fact, the 86th article explicitly says that these articles are the supreme law of the church, and that no congregation or classis is at liberty to alter, augment, or diminish them, and that they shall be observed as such until otherwise ordained by the synod. All the officers of the church are created, fixed and determined by this constitution; their duties are set forth and defined therein, and their terms, office and manner of election are created thereby. There could be no such thing as a local church or a consistory of the ministers or a classis without this constitution. The minister of the local church can only be called and installed and hold his office in the manner provided by this constitution. This is equally true of the consistory. These articles

> provide that no minister or consistory can be installed without subscribing to the formula of subscription established by the church, and that in case they obstinately persist in refusing to subscribe to such formula they shall be deposed from their office. *We cannot conceive of a form of church government more presbyterial in its nature than the one defined and set forth in these 86 articles*." [*Id.* at 690-691 (emphasis added).]

All the characteristics used by the Supreme Court in *Borgman* to determine whether CRCNA was hierarchical are still contained within the Church Order.

LCC contends, however, that CRCNA is hierarchical only as to ecclesiastical matters and is congregational with respect to property ownership (which, it asserts, is not an ecclesiastical matter). Our review of the documents, however, results in our agreement with the trial court that CRCNA is hierarchical with respect to property.

LCC's argument that CRCNA is congregational with respect to property ownership rests entirely on the model articles of incorporation (model articles), which the synod adopts and alters. LCC argues that the model articles adopted in 1970 gave CRCNA a "distinctly congregational" model and that the 1980 model articles were "even more 'distinctly congregational,' " but that the 1997 model articles then shifted back to a wholly hierarchical system.

Article VI of the 1997 model articles provided:

> A. **Manner in Which Held**
>
> All real and personal property shall be held exclusively in furtherance of the purposes of this church as a member church of the Christian Reformed Church in North America and in furtherance of the principles of doctrine and ecclesiastical government outlined under Articles III and V of these Articles of Incorporation and interpreted by

> the classis of which the church is a member (the "classis") subject to review on appeal by synod consistent with the Church Order.
>
> * * *
>
> D. **In the Event of Irreconcilable Division**
>
> In the event that the classis (or synod on appeal) determines that an irreconcilable division (schism) has occurred within this church, the confessing members of this church who, according to the exclusive determination of the classis (or synod on appeal), remain true to the purposes of this church as a member church of the Christian Reformed Church in North America and the principles of doctrine and ecclesiastical government outlined under Articles III and V of these Articles of Incorporation shall be the lawful congregation of this church and shall have the exclusive right to hold and enjoy the real and personal property of this church. Nothing in this Article VI shall prevent the classis (or synod on appeal) from determining, in keeping with the scriptural injunction of I Corinthians 6, that more than one group of confessing members of this church are each a lawful congregation and dividing the real and personal property between the groups of members as classis (or synod on appeal) may determine.

The very fact that the model articles include provisions related to the classis and synod's authority to determine property disputes clearly evidences that CRCNA is hierarchical with respect to property ownership.

LCC argues that adherence to these model articles is completely voluntary and that, because LCRC properly incorporated under the 1980 "congregational" model articles, LCRC could maintain a congregational model of ownership even when the model articles were changed in 1997. We disagree. Article 32(d) of the Church Order provides, "Each assembly shall provide for the safeguarding of its property through proper incorporation." The Church Order supplement for ar-

ticle 32(d) then provides the model articles. Nothing in the language of the Church Order, the Church Order supplements, or the model articles themselves suggests that the model articles are voluntary. In fact, the Church Order uses "shall," which is mandatory language. See also Manual of Christian Reformed Church Government, 2001 Revision, p 242 ("Article 38-c requires that a classis must be informed about a pending disbanding of a congregation, must approve such action, and must be consulted about the distribution of assets. A congregation's Articles of Incorporation should include these provisions and may include additional requirements to be met in the dissolution/disbanding process.").

LCC contends that the model articles are voluntary on the basis of language from the 1998 acts of the synod written in response to overtures (requests) to revise the 1997 decision on article IV (D) of the model articles. It was recommended that the synod "not accede to these overtures," that is, leave the 1997 article IV (D) unchanged, and included multiple grounds for the recommendation, the first of which was, "Since the new Model Articles of Incorporation are recommended to the churches with the understanding that each congregation may voluntarily implement them, the original authority of the local councils (as described in Church Order Article 27) is not violated." This does tend to support LCC's argument that the model articles are voluntary rather than mandatory. However, reading further, it appears that the synod declined to alter the 1997 model articles property provision, at least in part, because even the pre-1997 model articles presupposed that the classis (and synod on appeal) would determine a property dispute in the event of a disaffiliation or schism.

The previous version of model articles from 1980 included the following provision for determination of property disputes by classis:

> In the event of a schism in this church . . . , if a division of the property becomes necessary, this shall be found according to the scriptural injunction of I Corinthians 6. Every effort shall be made to achieve a just and fair property division of the property. *To this end, counsel, assistance and advice shall be sought first from the Classis and Synod* . . . .

LCC argues that this counsel or assistance from the classis was nonbinding. However, that argument was already refuted in *Borgman*, where the Michigan Supreme Court rejected the position of the local church that the "classis and synod may act in an advisory capacity to the consistory, but that in case their advice is disregarded they are powerless, to enforce their authority over the local church." *Id.* at 690. Thus, even under the 1980 version of the model articles, which LCC contends was the version LCRC incorporated under, the Denomination believed it had the authority to determine property disputes in the event of disaffiliation or schism, making it hierarchical with respect to real property ownership.

In any event, the fact that the model articles changed over time and did, at one time, permit a more lenient form of property ownership does not change the fact that, in 1997, the Denomination changed the model articles again, giving itself a more active role in property disputes. As this Court stated in *Calvary Presbyterian Church*:

> Times change, and it must be presumed that the original agreement to be bound by the Denomination's decisions included the possibility that the local Church might not agree with all those decisions. In this case the Denomi-

> nation apparently changed its outlook and policies between 1941 and 1980. The majority of the members of the Church did not. They were free as individuals to leave the Denomination, but not to depart from the "rules" which the Church had originally agreed to abide by, one of which was that the Denomination could supersede the Church's powers to govern itself by replacing its governing Session in the event of a dispute and that the Administrative Commission could determine to keep the real estate in the possession of the Denomination to the use of the nondeparting members. [*Calvary Presbyterian Church*, *supra* at 112-113.]

Here, the Denomination changed its policies in 1997. Those members who left LCRC to form LCC were free to leave both LCRC and the Denomination, but they could not prevent LCRC from being bound by the rules of the Denomination, which included that the Denomination could require church property disputes be decided by the classis with appeal to synod. The language in the Church Order and Church Order supplements, including both the 1980 and 1997 versions of the model articles, evidence an intent to set the Denomination up as the arbiter of property disputes, making it a hierarchical organization with respect to property ownership. Accordingly, the trial court's determination that CRCNA was hierarchical with respect to property was correct.

V. HIERARCHICAL METHOD/NEUTRAL PRINCIPLES OF LAW METHOD

LCC next argues that the trial court erred in using the polity/hierarchical method to determine property ownership rather than the neutral principles of law method. Michigan law provides that courts should generally use the hierarchical method. See, e.g., *Calvary Presbyterian Church*, *supra*; *Bennison*, *supra*. However, the neutral principles of law method may be appropriate in situations such as those where "it appears from

the church constitution, canons or rules, or from some other source, that an express trust exists in favor of one or the other of the contending parties . . . ." *Bennison*, *supra* at 724.

LCC argues that this case falls within the latter category because there is an express trust. LCC relies on the language in the bylaws and articles of incorporation for the Property Corporation, which states, in relevant part, that the purpose of the Property Corporation is "[t]o operate exclusively for the benefit of, and to carry out the purposes of the Lamont Christian Reformed Church, Coopersville, Michigan, or any church formed by a majority of the members of the Lamont Christian Reformed Church . . . ." Reliance on this language is only valid, however, as long as LCRC had the authority to set up the Property Corporation and transfer ownership of the church property to the Property Corporation. If LCRC had no such authority, the provisions of the Property Corporation are void. See *Blankespoor*, *supra* at 352 (holding that once a local church submits itself to the authority of a hierarchical denomination, provisions of the denomination's constitution override inconsistent provisions in a local church's articles of association).

Our determination whether LCRC had such authority is limited because "civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity." *Smith*, *supra* at 684 (citation and quotation marks omitted). See also *Milivojevich*, *supra* at 709 (holding that when disputes require inquiry into religious law and polity, civil courts shall not disturb the ecclesiastical body's decision). In this case, the Denomination, through the classis, has already decided this issue and determined that LCRC was without authority

both to create the Property Corporation and to transfer the church property to the Property Corporation without consent from Zeeland Classis. It concluded that the members of LCRC who were unhappy with the direction of the Denomination

> did not honor the intent of the Form of Subscription, which each of them signed when they took office, to follow the proper channels to express their disagreement with the decision(s) of Classis Zeeland, or to appeal such a decision. Instead, in violation of their signatures, some disaffected members actually promoted schismatic activity within the Lamont CRC, and continue to do so.

Most importantly, it noted that LCRC had not consulted with Zeeland Classis when it filed the articles of incorporation for the Property Corporation and held that "[i]f they had, Classis would certainly have ruled against doing so in this way." Thus, the Denomination determined that LCRC was without authority to create the Property Corporation and that by doing so, LCRC violated the Church Order. This Court may not redecide those issues. *Smith*, *supra* at 684. Accordingly, LCRC did not have the denominational authority to create the Property Corporation or to transfer ownership of the church property to the Property Corporation, and because those actions were unauthorized and inconsistent with the Church Order, they are void. *Blankespoor*, *supra.* As a result, there is no express trust and, without an express trust, the hierarchical method is preferred. *Bennison*, *supra* at 724. Accordingly, the trial court properly applied that method in this case.

VI. DISAFFILIATION

LCC next argues that the trial court erred in its determinations regarding when the disaffiliation proce-

dure took effect, its interpretation of the Church Order, and its retroactive application of the disaffiliation procedure. As before, our determination of these issues is limited. *Smith*, *supra* at 684. Here, Zeeland Classis already determined that disaffiliation occurred and the decision was not appealed to synod. Accordingly, this Court must abstain from deciding this issue and defer to the Denomination's decision, through the classis, that disaffiliation occurred.

Similarly, neither the trial court nor this Court may determine when the disaffiliation procedure took effect because the Denomination already interpreted its governing documents to conclude when the procedure took effect and determined that it took effect in 1997. See Manual of Christian Reformed Church Government, 2001 Revision, p 243 ("Synod 1997 adopted a disaffiliation procedure that must be followed by all churches proposing disaffiliation."). All of LCC's arguments related to the procedure for adoption of changes to the Church Order, and questioning whether the Denomination properly acted according to its own laws are outside the scope of what civil courts may decide, as these actions are clearly matters of ecclesiastical polity in which the courts may not interfere. *Holt v Trone*, 341 Mich 169, 174; 67 NW2d 125 (1954).

LCC's entire argument regarding to the property transfer also rests on civil courts interpreting ecclesiastical documents related to church polity. LCC argues that LCRC conveyed the church property to the Property Corporation on June 11, 1998, and that "[i]t was not until after this transfer that the synod ratified an article to the Church order that required that disaffiliation be resolved by the church authority." Indeed, the premise of its issue statement, that "none of [CRCNA's] governing documents contained such a restriction," is

directly contrary to the Denomination's determination of when the disaffiliation procedure took effect and that the creation of the Property Corporation was an act of disaffiliation. As before, where the Denomination itself has already determined that the property transfer to the Property Corporation was improper under the requirements of the Church Order, this Court must defer to those decisions. *Bennison*, *supra* at 713.

Accordingly, this Court must conclude, consistent with the Denomination's determinations, that disaffiliation took place, that the disaffiliation procedure was in effect in 1997 before the creation of the Property Corporation and the transfer of the church property, that the Denomination restricted LCRC from transferring the church property to the Property Corporation because it was an act of disaffiliation, and that the transfer had no effect on CRCNA's ability to determine the property dispute because it was entitled to do so under the disaffiliation procedure.

VII. ESTOPPEL

LCC's final argument on appeal is that defendants are estopped by CRCNA's failure to enforce the status of the Church Order and its supplements during the relevant time because Zeeland Classis failed to visit LCRC annually and review the minutes properly and, had it done so, it would have discovered the transfer. Defendants argue that estoppel has no application to the internal workings of the church.

We find it unnecessary to determine whether estoppel has any application to church property disputes because it does not apply here. In *Calvary Presbyterian Church*, a similar argument was made and this Court held that no estoppel was created:

> The Church further argues that the Denomination is estopped from now asserting an implied trust in the real estate when, in the mid-seventies, it allowed the Church, without dispute, to sell a house similarly held. The trial court did not find, nor do we, that this created an estoppel. The fact that the Denomination did not interfere with the actions of the Church in regard to that piece of property does not forestall it from now, during this doctrinal division, asserting its right to claim and retain ownership of the remaining Church property. [*Id.* at 113-114.]

The same is true here. The fact that Zeeland Classis did not discover the transfer of the church property to the Property Corporation in 1998 because it failed to thoroughly review all of LCRC's documents does not preclude the Denomination from exerting its authority under the Church Order to determine property disputes.

Affirmed. Defendants are entitled to costs under MCR 7.219.

In re FOSTER

Docket Nos. 289345 and 289346. Submitted July 15, 2009, at Detroit. Decided August 4, 2009. Approved for publication September 24, 2009, at 9:00 a.m.

The Wayne Circuit Court, Family Division, Virgil C. Smith, Jr., J., terminated the parental rights of Steven L. Foster and Tina Ann Szumanski to their minor child. Foster and Szumanski appealed separately, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Although the trial court found that several statutory grounds for termination were met, only one ground need be established by clear and convincing evidence. The trial court did not clearly err when it found under MCL 712A.19b(3)(c)(*i*) that the conditions that led to the adjudication continued to exist and that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the child's age.

2. The trial court did not clearly err by finding that termination was in the child's best interests. While Foster and Szumanski argue that the trial court improperly took into consideration the child's placement in foster care, the court did not consider that placement when deciding whether statutory grounds warranted termination. It is inappropriate for a court to consider the advantages of a foster home when deciding whether a statutory ground for termination exists, but that consideration is appropriate in a best-interests determination under MCL 712A.19b(5).

Affirmed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — BEST INTERESTS OF THE CHILD — FOSTER CARE PLACEMENT.

A court may consider foster home placement when deciding whether the termination of parental rights to the child is in the child's best interest (MCL 712A.19b[5]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Rebekah Mason Visconti*, Division

Chief, and *Tonya Celeste Jeter*, Assistant Attorney General, for the Department of Human Services.

Anthony G. Carlesimo for Steven L. Foster.

Janice A. Furioso for Tina A. Szumanski.

Before: SAAD, C.J., and SAWYER and BORRELLO, JJ.

PER CURIAM. In these consolidated appeals, respondents, Steven Lemer Foster and Tina Ann Szumanski, appeal the court's November 10, 2008, order that terminated their parental rights to the minor child, Tommy Jay Rule Foster, pursuant to MCL 712A.19b(3)(c)(*i*), (g), (i), (j), and (*l*). For the reasons set forth below, we affirm.

I. GROUNDS FOR TERMINATION

Pursuant to MCL 712A.19b(3)(c)(*i*), the trial court found that the "conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." Jurisdiction over Tommy was based on the application of the doctrine of anticipatory neglect, *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973), which provides that the parents' treatment of other children is indicative of how they would treat the child in question. The "conditions that led to the adjudication" with respect to Tommy were those surrounding the temporary wardship over his older siblings, which continued at the time of and after the termination of respondents' parental rights to Tommy. The underlying conditions included respondent father's drinking, the children's poor school attendance, and respondents' inability to manage their household and finances despite receiving extensive ser-

vices, which resulted in two evictions and a recurring lack of food. The proper inquiry is whether those conditions, to which the trial court presumed Tommy would be subject, continued to exist and whether there was any reasonable likelihood that they would be rectified within a reasonable time.

The record supports the court's ruling that respondent father's drinking continued to exist. Respondent father had not consistently submitted to alcohol screens, as required by the parent-agency agreement. He failed to provide any screens in 2008 and provided only 3 of 52 requested screens in 2007. And in 2006, he provided two screens during the entire year. Another of the initial conditions of adjudication relating to both respondents, school attendance, continued to be a problem. While respondents were able to bring their housekeeping to a marginally acceptable level, they did not adequately manage resources, as they remained unable to allocate bus fare for visits, even though both respondents worked and received supplemental security income benefits from the government. Under these conditions, the trial court did not clearly err when it found that the initial conditions of adjudication continued to exist.

Further, the trial court did not clearly err when it found that there was no reasonable expectation that the conditions of adjudication would be rectified within a reasonable time considering the ages of the children. MCL 712A.19b(3)(c)(*i*). Respondents received 10 years of services during the course of this case, and intensive services were provided before this case began. Over this length of time, respondents benefited only slightly, but in the opinion of foster care worker Beverly Purnell, not enough to provide the structure that Tommy needs. The family functioned marginally with intensive in-home

services, which were no longer available to them. Under these circumstances, the trial court did not clearly err by finding no reasonable expectation that the conditions of adjudication would be rectified within a reasonable time considering the ages of the children.

Because one statutory ground for termination was established by clear and convincing evidence, we need not consider whether the other grounds cited by the trial court also supported the termination decision.[1] *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991).

II. BEST INTERESTS OF THE CHILD

The trial court did not clearly err by finding that termination was in Tommy's best interests. Tommy was in the care of respondents for only five weeks of his life. His parents, by failing to substantially comply with their treatment plan and by providing only minimally adequate custody for the older children with extensive assistance (which was no longer available), demonstrated their inability to provide minimally adequate care and structure for Tommy, who has special needs and must continue therapy. Tommy developed well in his foster care placement and, according to an agency report filed after termination, his foster parents want to adopt him.

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[1] We note that the trial court clearly erred when it relied on MCL 712A.19b(3)(i) for the termination of respondents' parental rights. While the court properly found that respondents' parental rights to another child were terminated under MCL 712A.19b(3)(*l*), the record does not contain evidence that the termination was because of "serious and chronic neglect or physical or sexual abuse," as required by MCL 712A.19b(3)(i). In any event, the court had ample grounds to terminate respondents' parental rights to Tommy and, therefore, this error does not affect the disposition of the case.

Respondents argue that the trial court improperly took into consideration Tommy's foster care placement. Respondent mother relies on *Fritts v Krugh*, 354 Mich 97; 92 NW2d 604 (1958), overruled on other grounds by *In re Hatcher*, 443 Mich 426 (1993), to support her position. In *Fritts*, the Court found no evidence of neglect to justify termination and observed that

> [i]t is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and the question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children. [*Fritts*, *supra* at 115.]

In *In re Mathers*, 371 Mich 516, 530; 124 NW2d 878 (1963), the Supreme Court agreed that it was inappropriate to weigh the advantages of alternative placements against placement with the parents when deciding the questions of parental fitness and neglect. However, the Court also noted that such evidence "may have been relevant to an order of disposition . . . ." *Id.*

The trial court did not consider Tommy's foster home placement when deciding whether statutory grounds warranted termination of respondents' parental rights and, instead, considered his placement when deciding whether termination would be in his best interests. Importantly, an express statutory provision for the consideration of the best interests of the child did not exist when the cases cited earlier were decided; one was added by the 1994 amendments of the termination statute. *In re Trejo Minors*, 462 Mich 341, 350-351; 612 NW2d 407 (2000). Before those amendments, a trial court had the discretion to terminate parental rights once it found the existence of one or more statutory grounds for termination. *Id.* at 350. Now, "[o]nce the

petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established under [MCL 712.19b(3)], the liberty interest of the parent no longer includes the right to custody and control of the children."[2] *Id.* at 355. In other words, once a statutory ground is established, a parent's interest in the care and custody of his or her child yields to the state's interest in the protection of the child. *Id.* at 356. Thus, while it is inappropriate for a court to consider the advantages of a foster home in deciding whether a statutory ground for termination has been established, such considerations are appropriate in a best-interests determination. Accordingly, the court did not clearly err in its best-interests determination.

Affirmed.

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[2] The court in *Trejo* considered MCL 712.19b(5), the statute concerning consideration of best interests, as it existed before the recent amendment by 2008 PA 199 that was effective July 11, 2008.

SHIVERS v SCHMIEGE

Docket No. 284635. Submitted July 14, 2009, at Detroit. Decided September 29, 2009, at 9:00 a.m.

John Shivers brought a medical malpractice action in the Saginaw Circuit Court, Robert L. Kaczmarek, J., against Susan Schmiege, M.D., and Valley Anesthesia, P.C. (hereafter defendants), and others. The jury awarded past and future economic and noneconomic damages, and the court entered a judgment in favor of plaintiff. Defendants appealed from the denial of their motion for judgment notwithstanding the verdict or a directed verdict.

The Court of Appeals *held*:

1. Plaintiff's testimony and that of certain doctors and nurses provided a basis from which to infer that it would have helped more if the emergency decompressive cervical laminectomy that was performed on plaintiff had been performed earlier. The evidence was sufficient to allow the jury to infer that Dr. Schmiege was negligent in her treatment of plaintiff and that her failure caused a delay that cost plaintiff the use of his arms.

2. Plaintiff failed to present evidence that the jury could use to calculate the award for future economic damages. Plaintiff's counsel's reference to attendant care services was a suggestion regarding how to calculate noneconomic damages. The order denying the motion for judgment notwithstanding the verdict must be reversed and the award for future economic damages must be vacated.

3. The trial court did not err by concluding that plaintiff's loss of the functional use of his arms met the requirements in MCL 600.1483(1) for the application of the higher cap on the amount of noneconomic damages.

4. The trial court properly applied the cap on the amount of noneconomic damages that was in effect at the time the verdict was rendered, instead of the one in effect at the time the complaint was filed.

5. The trial court did not err by declining to apportion the cap to proportionally reduce plaintiff's damages for both past and

future noneconomic damages. It is proper to apply the cap to reduce the award for future damages first.

Affirmed in part, reversed in part, and award for future economic damages vacated.

SERVITTO, J., dissenting in part and concurring in part, dissented with regard to the majority's conclusion that plaintiff's counsel's reference to attendant care services was a suggestion regarding how to calculate noneconomic damages. There was no clear distinction between economic and noneconomic damages in counsel's argument. The record supports the conclusion that there was evidence upon which the jury could base its award of future economic damages for attendant care services. The trial court's denial of defendants' request for judgment notwithstanding the verdict should be affirmed. Judge SERVITTO agrees with the majority opinion in all other aspects.

1. DAMAGES — MEDICAL MALPRACTICE — NONECONOMIC DAMAGES CAP — WORDS AND PHRASES — LIMBS.

Application of the higher cap on damages for noneconomic loss in a medical malpractice action where the plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of one of more limbs caused by an injury to the spinal cord requires that two conditions be met: hemiplegia, paraplegia, or quadriplegia and a resulting loss of limb function; the terms "hemiplegic, paraplegic, or quadriplegic" do not describe the plaintiff's symptoms (i.e., the inability to use a limb) but, rather, the injury (i.e., a particular kind of damage to the nervous system); in addition to the injury, the plaintiff must exhibit the particular symptom of a total permanent functional loss of one or more limbs; the limbs in question may be arms (MCL 600.1483[1][a][*ii*]).

2. DAMAGES — MEDICAL MALPRACTICE — NONECONOMIC DAMAGES CAP.

The cap on damages for noneconomic loss in medical malpractice actions should be applied to reduce future damages first and need not be applied proportionately to past and future noneconomic damages (MCL 600.1483[1]).

Karl J. Weyand, P.C. (by *Karl J. Weyand, Jr.*), *Lawrence J. Acker, P.C.* (by *Lawrence J. Acker*), and *Mark Granzotto, P.C.* (by *Mark Granzotto*), for plaintiff.

Collins, Einhorn, Farrell & Ulanoff (by *Deborah A. Hebert*) for Susan Schmiege, M.D., and Valley Anesthesia, P.C.

Before: OWENS, P.J. and MURRAY and SERVITTO, JJ.

OWENS, P.J. In this medical malpractice case, defendants Susan Schmiege, M.D., and Valley Anesthesia, P.C. (hereafter defendants), appeal as of right from a judgment following a jury trial wherein the jury found in favor of plaintiff and awarded almost $1.8 million in economic and noneconomic damages. We affirm in part, reverse in part, and vacate the future economic damages award of $522,000.

I. FACTS AND PROCEDURAL HISTORY

In 2002, plaintiff was seventy years old. He was admitted to defendant St. Mary's Medical Center of Saginaw, Inc., to have his bladder removed because he was experiencing a lot of bleeding. He did not suffer from any central nervous system disorders or arm or leg weakness at that time.

The surgery did not go smoothly. At one point, a blood vessel was damaged and because of potential damage to plaintiff's colon from reduced blood supply, a colonoscopy had to be performed during the middle of the operation. He was in surgery about six hours. As he came out of the anesthesia, the nurse caring for him reported some weakness in both his hands. That condition was unchanged by the time he was moved to intensive care. Later that evening, defendant Dr. Schmiege noticed that plaintiff's left arm and hand were normal but the right arm was "abducting" (involuntarily moving up, away from his torso). As nurses examined plaintiff through the night, they recorded that his condition was not improving, and by around midnight, he had lost sensation in both hands. By 3:47 a.m., he had lost feeling in both arms and could not bend or move his fingers.

In the morning, doctors arrived and discovered that plaintiff could not move his left arm at all and his right arm had "significant neurological deficits." Doctors viewed this as a medical emergency and performed an emergency decompressive cervical laminectomy. However, by that time plaintiff had lost most of the use of his hands and arms. Plaintiff now requires a significant level of care and is in considerable pain from this injury.

After a trial, the jury returned a verdict finding Dr. Schmiege was negligent and that her negligence was a proximate cause of plaintiff's injuries. The jury awarded past and future economic and noneconomic damages totaling $1,750,500.

II. CAUSATION

Defendants argue that plaintiff failed to prove causation in that plaintiff failed to produce sufficient expert testimony proving that a delay caused him to suffer a worse injury than he would have suffered without the delay. We disagree.

A. STANDARD OF REVIEW

Defendants raised this issue in their motion for judgment notwithstanding the verdict or a directed verdict. This Court reviews de novo a trial court's decision on such motions. *Smith v Jones*, 246 Mich App 270, 273; 632 NW2d 509 (2001). An appellate court "review[s] the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

B. ANALYSIS

First, this is not a "loss of opportunity" case. In *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), Chief Justice TAYLOR explained in his opinion that this doctrine is available " 'where a plaintiff cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries.' " *Id*. at 152, quoting *Vitale v Reddy*, 150 Mich App 492, 502; 389 NW2d 456 (1986). This case is even less of a "lost opportunity" case than *Stone*, because there, had the plaintiff not sought medical treatment at all, the aneurysm in his leg would have ruptured and likely would have killed him. Here, had plaintiff not sought medical treatment, he would have had bloody urine and functional arms. In *Velez v Tuma*, 283 Mich App 396; 770 NW2d 89 (2009), the plaintiff did not plead a "lost opportunity" claim but only a traditional medical malpractice claim. Despite being instructed on "loss of opportunity," the jury found in favor of the plaintiff. This Court fully analyzed the relevant caselaw, agreed with the plaintiff that hers was a traditional medical malpractice claim, and affirmed the jury's decision. This case is factually and legally very similar to *Velez*, and we also conclude that plaintiff pleaded a traditional medical malpractice claim.

Turning to defendants' claim regarding the sufficiency of the evidence, the record does not reveal any testimony by a neurosurgical expert stating that an earlier laminectomy would have had a specific, better result. However, the evidence described by plaintiff, and reasonable inferences from it, is taken in the light most favorable to him. Here, the testimony clearly revealed that time was a factor. The evidence cited by plaintiff shows that his symptoms grew worse through the night. When defendant Dr. Bapineedu Maganti arrived in the

morning, he was dismayed at plaintiff's condition and did his best to find out why nothing had been done earlier. Dr. Schmiege testified that she agreed with Dr. Maganti's assessment that plaintiff's condition during the night qualified as a medical emergency. When Dr. Mark W. Jones found out what was happening, he ordered an immediate MRI and performed the laminectomy as soon as possible. That procedure did do a bit to relieve plaintiff's condition. From this evidence, we can infer that an earlier procedure would have helped.

Defendants argue that Dr. Schmiege's actions did not cause plaintiff's injury and that, if anyone caused plaintiff's injury, it was one of the nurses. They note that at 7:00 p.m., when Dr. Schmiege last examined him, plaintiff exhibited to her no warning signs of neurological impairment. This indeed is what Dr. Schmiege noted, but this Court examines *all* the evidence in a light most favorable to plaintiff. The jury may have decided that this was the point at which Dr. Schmiege acted negligently and that she should have diagnosed plaintiff's bilateral problems at 7:00 p.m. Also, there is a dispute over what happened when Nurse Diana R Kazmerski, concerned about plaintiff's unimproved condition, paged Dr. Schmiege around midnight. Dr. Schmiege testified that she never got that call, but Nurse Kazmerski testified that she made the call, it was answered, and the person whom she thought was Dr. Schmiege said she would be right in to see plaintiff. The next nurse on duty, Nurse Sarah Passariello-Hartman, testified that someone she thought was Dr. Schmiege examined plaintiff at 2:00 a.m., but Dr. Schmiege testified that she was at home at that time. The jury, weighing the credibility of these two witnesses, could have been persuaded that Dr. Schmiege was trying to protect herself or simply did not remember accurately what happened that night. This testimony is sufficient evidence to allow the jury to infer that Dr. Schmiege was

negligent in her treatment of plaintiff and that her failure caused a delay that cost plaintiff the use of his arms.

III. JURY AWARD OF FUTURE ECONOMIC DAMAGES

Defendants argue that there was no evidence presented showing that plaintiff would suffer any future economic damages. We agree.

A. STANDARD OF REVIEW

This issue was raised in defendants' motion for a new trial. This Court reviews for abuse of discretion a trial court's decision whether to grant a new trial. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*.

B. ANALYSIS

Defendants contend that plaintiff's counsel argued for attendant care services as an element of future *economic* damages. On the contrary, in context, counsel's reference to attendant care was a "suggestion"—as counsel himself put it—regarding how to calculate plaintiff's "pain and suffering [and] intimacy," which of course are *noneconomic* damages. Counsel argued the following to the jury in the context of *noneconomic* damages:

> [H]ow do you—calculate items of this type? I'm going to make a couple suggestions.
>
> * * *
>
> . . . But if you try to put it into real life terms, for example, instead of requiring the assistance of his daugh-

> ters, if [plaintiff] had an aid, a full-time aid, even at minimum wage and they were with him 16 hours a day, and, remember, he needs care 24 hours a day, you know, it doesn't take long to do a calculation. And if you paid them more than minimum wage, if they are skilled workers, because that's what he needs to or could benefit from in order to make his life that much easier than it currently is, those calculations quickly, in the course of a year, are in excess of 50 to $70,000.
>
> *Would that be fair compensation for Mr. Shivers in order to cope for the balance of his life and coping the previous five years with the pain that he suffers*? [Emphasis supplied.]

Buttressing this conclusion is that counsel—after listing braces, rails, handicaps, and a hospital bed as examples of *economic* damages—returned to figures similar to the estimated cost of attendant care services in referencing noneconomic damages. Specifically, counsel stated:

> His non-economic damages leads us back here to this difficult issue. Given the same circumstances, does $50,000 every year, does $100,000 every year, is that fair compensation for complete loss of the use of your hands to do the things that we all take for granted or is that too minimal? As I said, there is no book that I can look to to help you, and you are going to have to exercise your judgment.

Consequently, during closing argument plaintiff did not specifically request damages for attendant care services as an element of the jury's miscellaneous future economic damages award.

However, plaintiff did present evidence that his family members assist him with eating, getting dressed, using the bathroom, and basic hygiene. And from this evidence, it is reasonably certain that plaintiff would sustain future economic damages from his disability. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). Notably, however, plaintiff presented no evidence from which the jury could calculate such damages. While

"mere uncertainty as to the amount will not preclude the right of recovery," *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988) (quotation marks and citations omitted), and damages need not be ascertained with mathematical precision, *a reasonable basis must exist for their computation*, *Berrios v Miles, Inc*, 226 Mich App 470, 478-479; 574 NW2d 677 (1997). See also *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 767; 685 NW2d 391 (2004) (a jury's estimation of future economic loss must have support in the record).

While a jury may use its good sense and sound judgment to infer that plaintiff would require professional attendant care given the facts of this case, *Meier v Holt*, 347 Mich 430, 447; 80 NW2d 207 (1956), the only mechanism for calculating damages for attendant care was counsel's closing argument, and as pointed out previously, such a reference was related to the calculation of *noneconomic* damages.[1] Additionally, there was *no* evidence submitted at all about what attendant care costs were, what the typical rate was for such services, what plaintiff's life expectancy was, what the minimum wage was[2], or any other possible source of evidence upon which the jury could render an award.

This case is similar to what was addressed by this Court in *Attard v Citizens Ins Co of America*, 237 Mich

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[1] Even if the reference were to future economic damages, an attorney's argument cannot alone support the award because a jury's verdict regarding damages must be supported by the record. *Gilbert*, *supra* at 767.

[2] *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16; 761 NW2d 151 (2008), does not stand for the proposition that the current amount provided by the minimum wage law falls within the "common knowledge" of the jury, and other courts have been disinclined to so conclude. See, e.g., *Mendralla v Weaver Corp*, 703 A2d 480, 485 (Pa Super, 1997) (estimated cost of future medical expenses not within common knowledge of jury); *Potter v Homestead Preservation Ass'n*, 97 NC App 454, 463; 389 SE2d 146 (1990) (Greene, J., concurring in part and dissenting in part), rev'd on other grounds, 330 NC 569 (1992).

App 311, 321-322; 602 NW2d 633 (1999), where we held that the defendant's motion for judgment notwithstanding the verdict should have been granted on the basis of insufficient evidence concerning the *cost* of health care related items:

> [A] trial court should grant a party's motion for JNOV with respect to certain damages if the jury was permitted to speculate concerning the amount of those damages. [*Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998)]. See *Scott v Boyne City, G & A R Co*, 169 Mich 265, 272; 135 NW 110 (1912), in which our Supreme Court stated that "a case should not be submitted to the jury where a verdict must rest upon conjecture or guess."
>
> On the basis of the record in this case, we conclude that plaintiff presented insufficient evidence from which the jury could have found that he suffered $9,600 in damages related to the massage therapy or $2,100 in damages related to the health-club membership. Plaintiff's physician, Dr. Eric Backos, testified that he prescribed both massage therapy and a health-club membership for plaintiff. However, plaintiff presented no evidence concerning either the cost of either the therapy or the membership.

Thus, the simple fact that plaintiff presented evidence from which it may be inferred that plaintiff would require professional attendant care cannot, *ipso facto*, "show[] the extent of the damages as a matter of just and reasonable inference . . . ." *Meier*, *supra* at 447. Therefore, we reverse the trial court's order that denied defendant's motion for judgment notwithstanding the verdict, and vacate the future economic damages award of $522,000.

IV. APPLICATION OF DAMAGES CAP

Defendants argue that the trial court erred by (1) applying the higher damages cap, MCL 600.1483(1), (2) using the cap that was in effect when the judgment was

entered, rather than the cap in effect when the complaint was filed, and, (3) failing to apportion the capped damages to past and future damages for purposes of calculating prejudgment interest. We disagree.

A. STANDARD OF REVIEW

This issue raises questions of statutory construction, reviewed de novo by this Court. *Young v Nandi*, 276 Mich App 67, 70; 740 NW2d 508 (2007). However, in deciding whether plaintiff's injuries qualify for the higher cap, "the trial court is the finder of fact with regard to these unique elements of damage." *Id*. at 77.

B. ANALYSIS

(1) WHICH CAP APPLIES?

The trial court concluded that the higher cap applied because plaintiff suffered a total, permanent functional loss of two limbs. To qualify for the higher cap, plaintiff must be "hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs," caused by the injury to his spinal cord. MCL 600.1483(1)(a)(*ii*). Plaintiff correctly notes that "loss of 1 or more limbs" is inconsistent with the definitions of "hemiplegic, paraplegic, or quadriplegic," which all involve at least two limbs. But defendants are correct that the wording used indicates *two* conditions must be met: hemiplegia, paraplegia, or quadriplegia *and* a resulting loss of limb function. The same problem attends both of these interpretations: defendants' reading renders the second part of the clause unnecessary (the Legislature could have simply said, "hemiplegic, paraplegic, or quadriplegic" for the same effect defendants argue) and plaintiff's reading renders the first part of the clause

unnecessary (the Legislature could have simply said, "The plaintiff has total permanent functional loss of 1 or more limbs."). Both interpretations are on equal ground as far as sensible readings, and defendants' two-conditions reading is more consistent with the actual language of the statute than that of plaintiff. The Legislature might have wanted a person to qualify who was basically a paraplegic but retained some functionality in one leg, for example. Thus, plaintiff must show he was "hemiplegic, paraplegic, or quadriplegic" to qualify for the higher cap.

It is a fundamental rule of statutory construction that unless defined in the statute, a word or phrase used in a statute should be accorded its plain and ordinary meaning. MCL 8.3a; *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 245; 697 NW2d 130 (2005). Technical terms are to be accorded their peculiar meanings. MCL 8.3a; *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). There can be little debate that "hemiplegic," "paraplegic," and "quadriplegic" are technical, medical terms. Defendants provide several medical dictionary definitions in support of their assertion that paralysis of both arms does not satisfy any of these conditions. However, the medical definition of "paraplegia" includes "superior paraplegia": "paralysis of both arms." *Stedman's Medical Dictionary* (26th ed). Further research into the meaning of these technical, medical terms revealed that although lay people may have preconceptions of what they may mean (e.g., no use of legs in paraplegia and no use of arms or legs in quadriplegia), the medical community defines them on the basis of where along the spinal column the injury occurs, rather than in how or where

on the body the injury manifests itself.[3] Likewise, "paralysis" is defined as "[l]oss of power of voluntary

[3] See, e.g., the American Association of Neurological Surgeons' website, which provides the following definitions <http://www.neurosurgerytoday.org/what/patient_e/spinal.asp> (accessed May 12, 2009):

> Tetraplegia (a.k.a. quadriplegia) results from injuries to the spinal cord in the cervical (neck) region, with associated loss of muscle strength in all four extremities.
>
> Paraplegia results from injuries to the spinal cord in the thoracic or lumbar areas, resulting in paralysis of the legs and lower part of the body.

The website's glossary defines "hemiplegia" as "[p]aralysis of one side of the body." *Id*.

These conditions can be either "complete" or "incomplete":

> A complete SCI [Spinal Cord Injury] produces total loss of all motor and sensory function below the level of injury. Nearly 50 percent of all SCIs are complete. Both sides of the body are equally affected. Even with a complete SCI, the spinal cord is rarely cut or transected. More commonly, loss of function is caused by a contusion or bruise to the spinal cord or by compromise of blood flow to the injured part of the spinal cord.
>
> In an incomplete SCI, some function remains below the primary level of the injury. A person with an incomplete injury may be able to move one arm or leg more than the other, or may have more functioning on one side of the body than the other. An incomplete SCI often falls into one of several patterns. [*Id*.]

Notably, one of these "incomplete patterns" is "central cord syndrome," described thus:

> Central cord syndrome usually results from trauma and is associated with damage to the large nerve fibers that carry information directly from the cerebral cortex to the spinal cord. Symptoms may include paralysis and/or loss of fine control of movements in the arms and hands, with far less impairment of leg movements. Sensory loss below the site of the SCI and loss of bladder control may also occur, with the overall amount and type of functional loss related to the severity of damage to the nerves of the spinal cord. [*Id*.]

Plaintiff was diagnosed with central cord syndrome by Dr. Jones.

movement in a muscle through injury to or disease of its nerve supply." *Stedman's Medical Dictionary* (26th ed). This is not the same as "total loss of voluntary movement" that defendants would use to define the term. This more complex understanding of the terms used by the Legislature gives meaning to the second part of the clause because it explains how a person may have one of the listed conditions but still have lost the functional use of only one limb. The terms "hemiplegic, paraplegic, or quadriplegic" do not describe a plaintiff's *symptoms* (i.e., inability to use a limb) but the *injury*: a particular kind of damage to the nervous system. In addition to the injury, a plaintiff must exhibit a particular symptom: "total permanent functional loss of 1 or more limbs . . . ." Thus, defendants are correct in reading the statute as containing two requisite conditions, but plaintiff is correct in understanding that the medical conditions indicated by the Legislature are not as narrowly drawn as defendants would read them. The trial court did not err by finding the higher cap applies to plaintiff even though the limbs in question are his two arms.

The next question is whether the trial court clearly erred by finding as a matter of fact that plaintiff had suffered total, permanent, functional loss of both his arms even though he can use them when he uses his walker. As plaintiff notes, defendants presented no factual testimony regarding the extent to which plaintiff can use his arms. The facts identified by plaintiff are in the record: plaintiff testified that his arm braces helped him endure what would otherwise be constant pain and that he could use his left hand to feed himself, but only with a plastic spoon (metal is too heavy) and only certain foods. His right arm does not bend at the elbow.

Plaintiff argues that the Court must not overlook the presence of the word "functional" preceding "use." The trial court agreed that plaintiff's ability to use his arms to brace himself on his walker may be "using" his arms, but stated that it does not mean plaintiff has any "functional use" of those limbs. We agree. Defendants' reading replaces the word "functional" with "any," but this is impermissible revision of the statute as written. "Functional use" is similar to the concept of "loss of use," meaning " 'the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application.' " *Cain*, *supra* at 251 (quoting *Fuller v Locomotive Engineers' Mut Life & Accident Ins Ass'n*, 122 Mich 548, 553; 81 NW 326 [1899]). Plaintiff's testimony showed that although he could use his arms in certain ways to his benefit, they were no longer *functional* in the way that normal arms are. The trial court did not err by concluding that plaintiff's condition met the requirements necessary to gain the benefit of the higher cap.

(2) WHICH YEAR'S CAP APPLIES?

In *Velez*, *supra*, this Court stated:

> The statutory cap is applied, if at all, at the time the judgment is entered, and not when the complaint is filed. Thus, the amount of the statutory cap in effect at the time the judgment is entered is the cap that applies to an award of noneconomic damages. Until that time, a plaintiff has no right to enforce a verdict awarding noneconomic damages. See *Wessels v Garden Way, Inc*, 263 Mich App 642, 653; 689 NW2d 526 (2004). [*Velez*, *supra* at 417].

The verdict does not exist until the end of trial, sometimes years after the complaint is filed. The court cannot review a verdict to determine if a cap applies

until the verdict has been rendered. The plain reading of this provision is that the court uses the limitation in effect at the time the court is conducting the review; if the Legislature intended the court to apply a cap from another time, it would need to say so. Under defendants' proposed resolution, it would be possible to have a verdict where the amount of noneconomic damages is below the cap in existence at the time the judgment is entered, but above the cap in existence at the time the suit is filed. Dollar figures are generally given to the jury in terms of present value, not their value at the time suit is filed. Moreover, because the cap is adjusted yearly to reflect the cumulative annual percentage change in the consumer price index, it is possible for the index to *decrease* the cap. The point of the indexing is to keep the cap in line with current economic conditions. The successful plaintiff has no award to enforce until judgment is entered.

(3) APPORTIONING CAP AMONG PAST AND FUTURE DAMAGES

Defendants provide no legal support for their theory that the cap should be applied proportionately to past and future noneconomic damages. The trial court held that it was bound by the jury's finding of a specific amount of past damages and it was bound to use that amount to determine prejudgment interest. In *Velez*, *supra*, this Court addressed this issue and concluded:

> For the same reason that applying the noneconomic damages cap to reduce the jury's award . . . is not considered "ignoring" the jury's decision, applying the cap to only the award of past noneconomic damages is not considered "ignoring" the jury's decision; it is merely the application of the law. [*Id*. at 418.]

In *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 279 Mich App 552, 598, 761 NW2d 318 (2008), Judge

SMOLENSKI discussed at length the purposes of these statutes and concluded that to give effect to the remedial nature of the prejudgment interest statute, the cap should apply to reduce future damages first. *Dawe*, *supra* at 601-602 (SMOLENSKI, P.J., dissenting).

Although the majority opinion did not address this issue and decided the case on a different basis, Judge SMOLENSKI's dissent provides compelling reasoning on the issue. In *Dawe*, the trial court apportioned the cap between past and future noneconomic damages just as defendants here request. Judge SMOLENSKI noted that the purpose of the prejudgment interest statute is to provide a deterrence, " 'encouraging settlement at an earlier time and discouraging a defendant from delaying litigation solely to make payment at a later time.' " *Id*. at 599, quoting *Old Orchard by the Bay Assoc v Hamilton Mut Ins Co*, 434 Mich 244, 253; 454 NW2d 73 (1990), overruled on other grounds by *Holloway Constr Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608, 615-616 (1996). Concerning the trial court's decision to proportionately apply the cap, Judge SMOLENSKI concluded:

> Although this solution appears equitable on its face, it is clear from its application that it significantly undermines the remedial purposes of MCL 600.6013. Future damages include damages for harm that the plaintiff will suffer during his or her remaining life. Further, future damages are reduced to a present cash value and payable with the judgment. Hence, a plaintiff will invariably receive timely compensation for his or her future losses. In contrast, past damages reflect losses that the plaintiff has already incurred and for which he or she has not yet received any compensation. [*Dawe*, *supra* at 601 (citations omitted).]

The trial court did not err by declining to proportionately reduce plaintiff's past and future noneconomic damages.

V. CALCULATION OF DAMAGES

Defendants argue that the trial court erred by subtracting the settlement amount from the total, composite award because that resulted in defendants paying prejudgment interest on past damages for which plaintiff had already received compensation. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo an award of interest pursuant to MCL 600.6013. *Olson v Olson*, 273 Mich App 347, 349; 729 NW2d 908 (2006).

B. ANALYSIS

The trial court's order clearly indicates that it was going to do as defendants asked in this respect, and the sequence of figures follows defendants' proposed order. Defendants have not argued that the court erred in its basic calculations, nor have they pointed out what figures they take issue with. They provide no reason to reverse the trial court's decision, and their reply brief makes no attempt to counter plaintiff's argument. Thus, we decline to reverse the trial court.

VI. COLLATERAL SOURCE PAYMENTS

Defendants argue that either the jury improperly included medical expenses in its award or it awarded far more in "miscellaneous" expenses than the evidence supports. We disagree.

A. STANDARD OF REVIEW

A trial court's interpretation and application of MCL 600.6303 is a legal issue, reviewed de novo. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

B. ANALYSIS

MCL 600.6303(1) provides, in relevant part:

> In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, *evidence* to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source *shall be admissible* to the court in which the action was brought *after a verdict for the plaintiff and before a judgment is entered on the verdict*. [Emphasis added.]

Collateral source payments can only be used to reduce corresponding amounts awarded for the same type of damages. *Heinz*, *supra* at 305. In *Heinz*, the jury award was for medical expenses and lost wages combined. The trial court declined to reduce that by workers' compensation payments received because it had no way of knowing how much of the award was for medical expenses and how much was for wage loss. This Court reversed, noting that "both types of damages are 'paid or payable' by worker's compensation." *Id*. Thus, there was no problem subtracting the payments under the collateral source rule.

In this case, however, the only evidence regarding economic damages concerned the in-home care plaintiff's family provided him. The alleged collateral sources, including social security and disability insurance, did not cover these expenses. The trial court correctly noted that any attempt to parse the jury verdict into collateral-covered and noncollateral-covered expenses would be pure speculation. Defendants are stuck with their own verdict form. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997).

Affirmed in part and reversed in part. We vacate the future economic damages award of $522,000. No costs, neither party having prevailed in full. MCR 7.219.

MURRAY, J., concurred.

SERVITTO, J. (*concurring in part and dissenting in part)*. I respectfully dissent with regard to the majority's conclusion that defendants' motion for judgment notwithstanding the verdict should have been granted and that the future economic damages award of $522,000 should be vacated. I agree with the majority opinion in all other respects.

I first disagree with the majority's conclusion that counsel's reference to attendant care services was a suggestion regarding how to calculate *noneconomic* damages. While counsel's closing argument could certainly have been more precise, the gist of his request of the jury can be gleaned from the argument in its entirety. Counsel stated:

> There are two considerations here . . . . One consideration is economic and the other consideration is called non-economic. I want to talk about non-economic first.
>
> You've heard testimony regarding what this gentleman has to endure both in terms of pain, but trying to understand his life in terms of calculating, what's a fair way to evaluate how he can be compensated?

Counsel then described what plaintiff was unable do without the assistance of others, and continued:

> What the law says he's entitled to recover is compensation for not only the physical pain and suffering but the consequences of these problems. Think about the indignity of having to be dressed by other people . . . .
>
> * * *
>
> How do you—how can you calculate items of this type? I'm going to make a couple suggestions. You are not bound by them. . . .
>
> [I]f we were talking about one of the Tiger pitchers or

the Tiger catcher and we said to you he suffered an accident, it was as a result of someone's negligence and now for the balance of his life he cannot use his hands and arms in the normal function that you and I use our hands and arms, you wouldn't hesitate to try and calculate his monetary loss based on his annual salary. . . .

Nobody is talking about compensating Mr. Shivers in that type of context. But if you try to put it into real life terms, for example, instead of requiring the assistance of his daughters, if he had an aid, a full-time aid, even at minimum wage and they were with him 16 hours a day, and, remember, he needs care 24 hours a day, you know, it doesn't take long to do a calculation. And if you paid them more than minimum wage, if they are skilled workers, because that's what he needs or could benefit from in order to make his life that much easier than it currently is, those calculations quickly, in the course of a year, are in excess of 50 to $70,000.

Would that be fair compensation for Mr. Shivers in order to cope for the balance of his life and coping the previous five years with the pain that he suffers?

Counsel then detailed the questions on the jury verdict form, continuing:

And finally there are questions about calculating his economic damages.

So think about things like expenses that he may incur for these braces and expenses that he may incur trying to make sure that his home has rails and handicaps [sic] and a hospital bed.

His non-economic damages leads us back here to this difficult issue. Given the same circumstances, does $50,000 every year, does $100,000 every year, is that fair compensation for complete loss of the use of your hands to do the things that we all take for granted or is that too minimal? . . .

The second page of the form deals with the future, and I mentioned to you that part of the damage equation is

> whether or not he will sustain damages in the future. In the non-economic we know he's not getting well. . . . So his ability to do anything for himself is going to diminish with time, not get better.
>
> And if his wife doesn't survive him, if he survives her, then he's still going to be dependent on his children. He's still going to need or want to access outside help in order to cope with these daily issues that his wife will no longer be able to provide. Or if she becomes ill and can't do it, you have to give consideration to the replacement, and we know he can't get well from this point forward.

Viewing counsel's argument in its entirety, there was no clear distinction between counsel's arguments regarding economic and noneconomic damages. While counsel undoubtedly referenced noneconomic damages, in the same train of thought he also referenced the computation of lost wages—an economic damage. Contrary to the majority's conclusion, there was no true delineation between economic and noneconomic damages in counsel's argument to suggest that counsel was referring solely to noneconomic damages when speaking about the daily care and assistance plaintiff required.

I also disagree with the majority's conclusion that there was no evidence upon which the jury could base its award for future economic damages. As acknowledged by the majority, the evidence unequivocally established that plaintiff required assistance in dressing, using the bathroom, and, among other things, with basic hygiene. As also acknowledged by the majority, the evidence made it clear that plaintiff was reasonably certain to sustain future economic damages as a result of his disability. In the closing argument, plaintiff's counsel suggested that a fair way to measure damages might be to consider a minimum wage payment to a caregiver for 16 hours a day. Plaintiff's counsel did not

ask the jury to speculate and award the rate paid to professional attendant care workers. The record supports the reasonable conclusion that counsel, perhaps without precision, requested attendant care services as an element of future economic damages at minimum wage for 16 hours a day. Jurors are free to consider their own general knowledge and intelligence concerning the affairs of life. *Rajnowski v Detroit, BC & A R Co*, 74 Mich 15, 17; 41 NW 849 (1889). Perhaps not all in the general public know with specificity the prevailing minimum wage, but one can safely conclude that the majority of the general public is aware that current minimum wage is less than ten dollars an hour. Moreover, there is no bright-line degree of specificity required in the calculation of damages. Courts allow the reasonable estimation of damages where actual damages are difficult or impossible to calculate. *Cicelski v Sears, Roebuck & Co*, 422 Mich 916, 918 (1985) (statement by LEVIN, J.). This is not a case where the jury's award of future economic damages exceeded the bounds of reason.

No one disputes that plaintiff requires, and will continue to require, assistance with the most basic tasks of daily living. There is also no dispute that one of the individuals who previously assisted plaintiff with his daily tasks is now deceased, and that plaintiff's elderly wife is finding it more and more difficult to assist him. Clearly, plaintiff will have to look to others for assistance in the future. The evidence at trial established the need for attendant care services as a part of future economic damages. Counsel's request for attendant care services as an element of future economic damages, at the rate of minimum wage, was sufficient to allow the jury to return its award of $522,000.

We also cannot forget that our circuit courts are courts of equity. Because the evidence clearly established plaintiff's future economic damages (the need for attendant care services), and plaintiff's counsel's closing argument can readily be interpreted as a request for minimum wage compensation for these damages, and the jury, after careful and considered deliberation determined that plaintiff was entitled to these damages, it would be inequitable to deny these damages simply because counsel bounced back and forth during his closing argument between his request for noneconomic and economic damages. I would affirm the trial court's denial of defendants' request for judgment notwithstanding the verdict with regard to the future economic damages.

In re GENAW ESTATE

Docket No. 284214. Submitted July 14, 2009, at Detroit. Decided October 6, 2009, at 9:00 a.m.

Gaylord Genaw, Jr., as representative of the estate of Gaylord Genaw, Sr., deceased, brought an action in the St. Clair Probate Court against Cindy Genaw and Unum Life Insurance Company, seeking to recover the money that Unum had paid Cindy Genaw under the decedent's life insurance policy. Although Cindy Genaw was the named beneficiary of the policy, she had divorced the decedent three days before his death, and the divorce judgment expressly extinguished the parties' interests in each other's life insurance policies. Cindy Genaw filed her benefit claim with Unum as an "ex-spouse" of the decedent, and the decedent's death certificate, which Unum received in connection with the claim, also indicated that he was divorced. The court, John D. Tomlinson, J., granted summary disposition in plaintiff's favor with respect to both Cindy Genaw and Unum, reasoning that the claim and loss report that Genaw had filed constituted written notice of a claim and the divorce by "any other person having an interest in the policy" under MCL 552.101(2), which does not specify that the notice be given by someone other than the named beneficiary. Unum appealed.

The Court of Appeals *held*:

MCL 552.101(2), which absolves an insurance company from liability for payment of proceeds from a life insurance policy to the designated beneficiary unless it receives written notice of a claim under the policy and of a divorce, does not require that the notice be given by someone other than the named beneficiary. Rather, it allows such notice to be provided by or on behalf of the insured or the estate of the insured, one of the heirs of the insured, or any other person having an interest in the policy. This interpretation is consistent with the purposely broad and encompassing statutory language that is evidenced by the use of the word "any," as well as with caselaw defining "notice" as whatever is sufficient to direct a person's attention to prior rights or equities of a third party and to enable that person to ascertain their nature by inquiry. This interpretation also fulfills the statute's intended purpose of pre-

cluding the inadvertent payment of benefits to a former wife who had waived her rights to the insurance policy in the divorce.

Affirmed.

Judge FITZGERALD, dissenting, stated that the fact that Genaw and the decedent were divorced was not enough to notify Unum that Genaw, as the policy beneficiary, had no rights to the proceeds of the policy. The plain language of the statute absolves an insurer of liability for paying its proceeds in accordance with the terms of the policy unless, before the payment, it receives written notice of a claim and of the divorce from the insured or the estate of the insured, the heirs of the insured, or any other person having an interest in the policy. A claim by such a person would give the insurer notice that the former wife's interest in the policy had been extinguished and that a claim by someone other than the beneficiary existed. Thus, "other person" logically means a person other than the claimant and beneficiary already known to the insurer.

INSURANCE — LIFE INSURANCE — DIVORCE — NOTICE.

The statutory provision that absolves an insurance company from liability for payment of proceeds from a life insurance policy to the designated beneficiary unless it receives written notice of a claim under the policy and of a divorce does not require that the notice be given by someone other than the named beneficiary (MCL 552.101[2]).

Heyboer & Floyd, P.L.L.C. (by *David R. Heyboer*), for plaintiff.

Miller Johnson (by *D. Andrew Portinga* and *J. Michael Smith*) for defendants.

Before: TALBOT, P.J., and FITZGERALD and HOEKSTRA, JJ.

TALBOT, P.J. Defendant Unum Life Insurance Company, appeals as of right the order granting summary disposition in favor of plaintiff, Gaylord Genaw, Jr., as personal representative of the Genaw Estate (the Estate). We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

This action involves the erroneous payment of insurance proceeds to defendant Cindy Genaw (Genaw), the ex-wife of plaintiff's decedent. In 2001, the decedent obtained an insurance policy with Unum valued at $111,000 and designated Genaw as his beneficiary. The decedent and Genaw divorced on July 3, 2006. Their judgment of divorce specifically contained a waiver provision, which extinguished both parties' respective interests in any insurance policy on the other's life. Only days after the entry of the divorce judgment, the decedent was killed in an automobile accident. His beneficiary designation on the life insurance policy with Unum had not been changed.

On October 2, 2006, a loss report was completed that listed Genaw as the claimant and designated her relationship to the decent as an "ex-spouse." Approximately two weeks later, Genaw filed a claim for benefits and indicated on the form that the decedent was divorced. A death certificate, which indicated decedent's marital status as divorced, was also submitted with a copy of the benefits claim. Upon receipt of the claim information, Unum conducted an investigation and determined that benefits were payable pursuant to its policy. Shortly after receiving a copy of the beneficiary designation form, which continued to list Genaw as the policy beneficiary, Unum remitted payment to her in the full amount of the policy.

Approximately one month later, plaintiff was appointed the personal representative of the decedent's estate and became aware of the existence of the Unum policy. Plaintiff contacted Unum on January 16, 2007, seeking to claim the policy benefits on behalf of the Estate. Unum denied the claim on the ground that the policy had already been discharged. Plaintiff initiated

litigation against Genaw and Unum to recover the monies remitted by Unum for the Estate. The trial court granted partial summary disposition in favor of plaintiff against Genaw in the amount of $111,000. The trial court ordered that the funds remaining in Genaw's bank account that Unum had paid her, which amounted to $42,659.54, be seized and held in escrow in partial satisfaction of the judgment.[1] In addition, the trial court granted partial summary disposition in favor of plaintiff against Unum in the amount of $111,000, with a setoff for $42,659.54, the amount recovered from Genaw. This appeal focuses exclusively on the interpretation and meaning of the statutory language comprising MCL 552.101(2).

II. STANDARD OF REVIEW

"The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute's plain language." *Houdek v Centerville Twp*, 276 Mich App 568, 581; 741 NW2d 587 (2007). "If the meaning of a statute is clear and unambiguous, then judicial construction to vary the statute's plain meaning is not permitted." *Id.* "The Legislature is presumed to have intended the meaning it plainly expressed." *Watson v Bureau of State Lottery*, 224 Mich App 639, 645; 569 NW2d 878 (1997). Further, "[a] court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Id.* (citation omitted). "[W]e are bound to interpret plain statutory language

[1] The trial court also awarded plaintiff $15,650 in damages against Genaw, finding her in violation of MCL 700.1205(4) for wrongful conversion or embezzlement of property rightfully belonging to the Estate.

as written." *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 279 Mich App 552, 569; 761 NW2d 318 (2008), lv gtd 483 Mich 999 (2009).

III. ANALYSIS

MCL 552.101(2) states, in its entirety:

> Each judgment of divorce or judgment of separate maintenance shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the husband in which the wife was named or designated as beneficiary, or to which the wife became entitled by assignment or change of beneficiary during the marriage or in anticipation of marriage. If the judgment of divorce or judgment of separate maintenance does not determine the rights of the wife in and to a policy of life insurance, endowment, or annuity, the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates. *However, the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice, by or on behalf of the insured or the estate of the insured, 1 of the heirs of the insured, or any other person having an interest in the policy, of a claim under the policy and the divorce.* [Emphasis added.]

As discussed by this Court in *Metropolitan Life Ins Co v Church*, 150 Mich App 539, 544-545; 389 NW2d 124 (1986):

> The purpose of the 1939 amendment to MCL 552.101 . . . was to resolve the situation where a divorced wife could inadvertently receive the proceeds of a forgotten policy.
>
> "Prior to the addition in 1939 of the above-quoted portion of the statute to MCLA § 552.101, the wife was entitled to the proceeds of the policy when she remained the designated primary beneficiary *after a divorce. Ancient Order of Hibernians v Mahon* (1922), 221 Mich 213 [190 NW 696]

> and *Guarantee Fund Life Association v Willett* (1927), 241 Mich 132 [216 NW 369]. The effect of the amendment, as stated in the title to the statute, in the judgment of divorce, and, in the statute itself, was to affect the interest of the *wife* in the insurance policy and thus cure the situation where a divorced wife could *inadvertently receive* the proceeds of a perhaps forgotten policy. 'Inadvertently receive' should be stressed for the statute does not prohibit the husband or divorce judgment itself from retaining or renaming the wife as the primary beneficiary. It simply requires affirmative action on the part of the court or husband to retain the divorced wife as the primary beneficiary and thus eliminate what could be, and usually appears to be, the inadvertent payment of the life insurance proceeds to a divorced wife." *Starbuck v City Bank & Trust Co*, 384 Mich 295, 299; 181 NW2d 904 (1970) (emphasis in original).

Clearly, the purpose of the statute is to resolve inconsistencies and problems that originated in family law when an ex-spouse waived his or her right to a policy of insurance (or other benefit) but a change in beneficiary was not effectuated. This is evidenced by the language that precedes the disputed portion of the statutory subsection imposing a requirement that all judgments of divorce include provisions clarifying the rights of former spouses to retain an interest in certain identified benefits or policies.

On appeal, it is the contention of Unum, which the dissent adopts, that the language of MCL 552.101(2) does not encompass notice of a claim asserted by a beneficiary, and that the information provided by Genaw, which merely alerted Unum to the existence of a divorce without submission of an actual copy of the judgment or its explicit terms, was insufficient to place the insurer on notice or to impose liability for a payment of the insurance proceeds that was consistent with the policy's beneficiary designation. However, such

an interpretation is not consistent with the actual language of the statute because it improperly inserts wording that does not exist into the statutory provision.

The statutory language absolves an insurance company from liability for payment of the policy proceeds to the designated beneficiary unless it "receives written notice . . . of a claim under the policy and the divorce." The statute requires only notice "of a claim . . . and the divorce." The statutory requirement that notice of the existence of a divorce be provided does not equate to a mandate that an actual copy of the document or detailed information regarding the content of a judgment of divorce be submitted in conjunction with the filing of a claim. This is consistent with the definition of "notice" provided in caselaw as

> "whatever is sufficient to direct attention . . . to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property." [*Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995), quoting *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).]

Interpreting the statute as merely requiring the providing of notice of the existence of a divorce is consistent with its language and fulfills the intended purpose of precluding the inadvertent payment of benefits to the wrong person.

In addition, the statutory language allows such notice to be provided "by or on behalf of the insured or the estate of the insured, 1 of the heirs of the insured, *or any other person having an interest in the policy.*" (Emphasis added.) Through a strained path of reason-

ing, the dissent and Unum contend that "any other person having an interest in the policy" excludes a named beneficiary. However, that is inconsistent with the statutory language. The wording is not restrictive, as denoted by the use of the word "any." The statute is purposely broad and encompassing and requires an inclusive definition of who may satisfy the definition of "any other person having an interest in the policy." It is difficult to comprehend how a designated beneficiary would not be encompassed by such a definition. As indicated by the statutory language, the insured, the insured's estate, and an heir are specifically identified as having a potential interest in a policy. Who, other than a designated beneficiary, could also be construed as having an identifiable "interest" in the policy? Given the intent of the statutory provision to preclude "inadvertent payment" of benefits to the wrong individual, it cannot be disputed that the designated beneficiary, if unchanged following entry of a divorce judgment, is the most obvious person the provision should target to prevent him or her from receiving the proceeds of the policy and the most likely to assert a claim.

While factually distinguishable from the present case, our Supreme Court's ruling in *Thom v Washington Nat'l Ins Co*, 341 Mich 522; 67 NW2d 809 (1954), is instructive. In *Thom*, a dispute existed regarding whether an estate administrator had provided the insurance company with notice of the decedent's divorce from the designated policy beneficiary. The Court determined that the estate did not have a cause of action against the insurance company based on the failure to provide notice to the insurer of the existence of a divorce. *Id.* at 523-525. The *Thom* Court ruled in relevant part "that 'giving plaintiff's testimony its full weight and considering the alleged writing made by the woman clerk to be written notice, there is no testimony

that such notice or information advised the defendant insurance company *that a divorce decree had been entered*.' " *Id.* at 526 (emphasis added). Notably, the Court merely required notice of the entry of a divorce decree, not the actual submission of the judgment or a detailed elucidation of its provisions.

In *Thom*, the Court determined that notice of a divorce had not been provided. Hence, the insurance company could not be held liable given the language of MCL 552.101. Accordingly, the Court's ruling is reasonable:

> The statute is explicit and we are not acquainted with any reason to depart from its terms and in effect, in a case such as this, place upon the company the onus of investigating all ramifications of a patently defective notice. We feel that the statute is intended to do more than put the company "on guard." It is intended to be a conclusive determinant of liability if the prescribed procedure is followed. [*Id.* at 526-527.]

In contrast, in the circumstances of this case, it is undisputed that Genaw reported her marital status as that of an ex-wife and informed the insurance company of the existence of the divorce from the decedent as part of her claim submission. Consistent with the holding in *Thom*, this notice did more than merely place the insurance company "on guard"; it required them to investigate further before remitting payment of the benefits to the designated beneficiary. Further, the statute only implies that an insurance company may be liable if it pays the proceeds of a policy to a designated beneficiary despite having received notice of a claim and the existence of a divorce. The statute does not mandate the automatic imposition of liability following the receipt of notice. In accordance with the statute, an insurance company is only "discharged" from the imposition of liability if it pays the benefits in accordance

with the policy designation and does not receive written notice of a claim and a divorce.

Under the factual circumstances of this case, it is undisputed that Unum received a claim from Genaw that specifically acknowledged both her status as the ex-wife of the decedent and the existence of a divorce. Consequently, this information, submitted in conjunction with her claim, was sufficient to meet the notice requirement imposed by the existing statutory language, and the insurance company was not absolved of its liability for payment of the proceeds to the designated beneficiary.

It is important to recognize that this statute may prove to be more confusing than helpful to insurance companies given that the determination of the proper beneficiary for payment of policy proceeds is highly dependent on factual circumstances unique to each case. For example, a specific concern is the statute's failure to indicate when it is preempted under ERISA, 29 USC 1001 *et seq*. Although these parties have stipulated that this policy is exempt from ERISA because it was not issued as an employee-related benefit, in cases where MCL 552.101 is preempted, irrespective of having received notice of a divorce, insurance companies are mandated to pay insurance policy proceeds in accordance with the contractual beneficiary designation. *Sweebe v Sweebe*, 474 Mich 151, 154-155; 712 NW2d 708 (2006), citing 29 USC 1104(a)(1)(D). Consistent with preemption, in cases falling within the purview of ERISA, liability is typically assigned to the ex-spouse who engaged in the fraudulent or wrongful retention of the policy proceeds after having waived such benefits within a judgment of divorce. *Moore v Moore*, 266 Mich App 96, 98; 700 NW2d 414 (2005).[2]

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[2] See also *Metropolitan Life Ins Co v Flusty*, 545 F Supp 2d 624 (ED Mich, 2008); *Brown v Wright*, 511 F Supp 2d 850 (ED Mich, 2007);

While the more logical and straightforward course would be to adopt the methodology and procedure followed by cases preempted by ERISA, it is for the Legislature to determine whether the statute should be modified. In the interim, the courts can only attempt to follow the dictates of the current statutory language as it is written.

Affirmed.

HOEKSTRA, J., concurred.

FITZGERALD, J. (*dissenting*). I respectfully dissent because I do not believe that Cindy Genaw, as the contractual beneficiary of the insurance policy, is one of the persons qualified to provide the necessary notice under MCL 552.101(2).

Unum Life Insurance Company issued a group insurance policy to Upper Northwest Bankers Association.[1] The policy provided accidental death and disability (AD&D) coverage for customers of members of the Northwest Bankers Association who enrolled under the policy, including decedent, who was married to Genaw. Decedent enrolled in the plan on August 10, 2001, and designated Genaw as his beneficiary. Decedent had a total of $111,000 in AD&D coverage, including benefits payable under an escalator clause.

The Genaws divorced on July 3, 2006. The judgment of divorce expressly extinguished the interest of each party in any insurance policy on the life of the other

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Seaman v Johnson, 184 F Supp 2d 642 (ED Mich, 2002); *Metropolitan Life Ins Co v Pressley*, 82 F3d 126 (CA 6, 1996); *Kennedy v Plan Administrator for DuPont Savings and Investment Plan*, ___ US ___; 129 S Ct 865; 172 L Ed 2d 662 (2009); *Egelhoff v Egelhoff*, 532 US 141; 121 S Ct 1322; 149 L Ed 2d 264 (2001).

[1] The policy is not a benefit covered by the Employees Retirement Income Security Act of 1974 (ERISA).

party. On July 6, 2006, decedent died as the result of an automobile accident. The death certificate lists decedent's marital status as divorced.

On October 2, 2006, a loss report was completed that listed Genaw as the claimant and her relationship to decedent as "ex-spouse." On October 16, 2006, Genaw filed a claim for benefits, checking the box on the claim form to indicate that decedent was divorced. Insurance Administrative Services, Inc. (IAS), forwarded the written claim and a copy of the death certificate to Unum.

In November 2006, Unum conducted an investigation of Genaw's claim and determined that the death was a loss for which policy benefits were payable. On December 1, 2006, Unum received a copy of the beneficiary designation form naming Genaw as the policy beneficiary. On December 4, 2006, Unum paid Genaw the $111,000 in benefits payable under the policy. Unum knew before paying the claim that decedent and Genaw were divorced.

On December 18, 2006, plaintiff was appointed personal representative of decedent's estate. Until that time, he was unaware of the existence of the Unum policy. On January 16, 2007, plaintiff contacted Unum, seeking the policy's benefits. This was the first time that Unum became aware of plaintiff's claim to the policy benefits. On January 19, 2007, Unum denied the claim because the policy had already been discharged.

Plaintiff thereafter sued Genaw and Unum and managed to recoup $42,659.94 from Genaw's savings account, which was all she had left of the insurance proceeds.[2] Plaintiff eventually moved for summary disposition under MCR 2.116(C)(10), asserting that the

[2] The record reveals that Genaw's expenditures from the insurance proceeds included, among other things, cash gifts to her sons and the purchase of a car.

estate had a right as a matter of law to the balance of the policy's benefit. The probate court ordered Unum to pay the balance, $68,340.46. The court's decision turned on its interpretation of MCL 552.101(2), which provides as follows:

> Each judgment of divorce or judgment of separate maintenance shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the husband in which the wife was named or designated as beneficiary, or to which the wife became entitled by assignment or change of beneficiary during the marriage or in anticipation of marriage. If the judgment of divorce or judgment of separate maintenance does not determine the rights of the wife in and to a policy of life insurance, endowment, or annuity, the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates. *However, the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice, by or on behalf of the insured or the estate of the insured, 1 of the heirs of the insured, or any other person having an interest in the policy, of a claim under the policy and the divorce.* [Emphasis added.]

The probate court held that the claim and loss report filed by Genaw constituted written notice of a claim and the divorce by "any other person having an interest in the policy," and so Unum was not statutorily absolved of liability. The court reasoned that a "careful reading" of the statute "does not require that notice be given by someone other than the named beneficiary." The court concluded that the word "other" in the second to last clause of the statute's last sentence "was meant to be an all[-]inclusive clause including anyone else with an interest in the policy other than the insured, his estate,

or one of his heirs." Thus, the court reasoned, Genaw was one of the persons qualified to give notice.

INTERPRETATION OF MCL 552.101(2)

Under MCL 552.101(2), a judgment of divorce is to determine all rights of the wife in and to, among other things, any policy of life insurance on the life of the husband in which the wife was named as beneficiary. Only if the judgment of divorce does not determine the rights of the wife in and to a policy of life insurance is the policy payable to the estate of the husband or to the named beneficiary if the husband so designates. Importantly, the statute also provides that the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice by or on behalf of (1) the insured or the estate of the insured, (2) one of the heirs of the insured, or (3) any other person having an interest in the policy, of a claim and the divorce.

At issue in this case is whether Unum received the requisite written notice "by or on behalf of . . . any other person having an interest in the policy, of a claim and the divorce" before payment of its proceeds in accordance with the terms of the policy. This Court reviews de novo questions of statutory interpretation. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The paramount rule of statutory interpretation is that we are to give effect to the intent of the Legislature. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute

as written. This Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted). As far as possible, effect should be given to every phrase, clause, and word in the statute, and "we should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

Only one case interprets the pertinent last sentence of MCL 552.101(2). In *Thom v Washington Nat'l Ins Co*, 341 Mich 522; 67 NW2d 809 (1954), the decedent had purchased a life insurance policy from an insurance company that merged with the defendant. The defendant assumed the decedent's policy, which named his wife as his beneficiary. *Id.* at 523. The former insurance company had issued policies to members of the Automobile Club of Michigan, of which the decedent was a member. *Id.* at 523, 526. The decedent's policy was renewed annually with his club membership. *Id.* at 523. The decedent and his wife later divorced, but the beneficiary designation remained unchanged. *Id.* The decedent died five years after the divorce, after which his ex-wife filed a claim on the policy.

The plaintiff testified that after the decedent's death, he went to the Dearborn office of the automobile club and informed an unidentified clerk that the policy should be paid to the attorney for the estate. *Thom*, *supra* at 525. The plaintiff testified that the clerk wrote a memorandum with this information and attached it to the policy. The memorandum could not be located, however, and the defendant asserted that it had never received it. *Id.* The defendant paid the policy benefit to the ex-wife. *Id.* at 523. The estate sued them both for

improperly paying and receiving the benefit. The trial court concluded "that 'giving plaintiff's testimony its full weight and considering the alleged writing made by the woman clerk to be written notice, there is no testimony that such notice or information advised the defendant insurance company that a divorce decree had been entered.' " *Id.* at 526. The trial court ruled against the ex-wife for the full amount of the policy, but held that the plaintiff had no cause of action against the defendant insurer because the insurer had no notice of the divorce. *Id.* at 523-525. On appeal, the Supreme Court affirmed the lower court on the basis of the statutory language:

> The statute is explicit and we are not acquainted with any reason to depart from its terms and in effect, in a case such as this, place upon the company the onus of investigating all ramifications of a patently defective notice. We feel that the statute is intended to do more than put the company "on guard." It is intended to be a conclusive determinant of liability if the prescribed procedure is followed. [*Id.* at 526-527.]

Unlike the situation in *Thom*, Unum did in fact receive written notice of the divorce.[3] Specifically, the loss report form indicated that Genaw was decedent's "ex-spouse," and Genaw checked the box on the claim form indicating that decedent was divorced.

The fact that decedent and Genaw were divorced, however, is not enough to tell Unum that Genaw, as the beneficiary under the policy, had no right to the proceeds of the policy.[4] Indeed, the plain language of the

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[3] The statute does not require submission of an actual copy of the judgment of divorce to put the insurer on notice.

[4] While MCL 552.101(2) requires that a judgment of divorce determine all rights of the wife in and to a life insurance policy, it does not require that the judgment extinguish those rights. Only when the judgment of

statute absolves an insurer of liability for paying its proceeds in accordance with the terms of the policy unless before the payment it receives written notice of a claim and of the divorce *from one of the persons identified in the statute*. These specified persons—(1) the insured or the estate of the insured, (2) the heirs of the insured, or (3) any *other* person having an interest in the policy—are plainly ones who *could* have an interest in the policy *if* the beneficiary designated in the policy no longer had a right to the benefits of the policy. A claim by such a person would clearly give the insurer notice of the extinguishment of the former wife/beneficiary's interest in the policy and of the existence of a claim by one other than the beneficiary designated in the policy. Thus, "other person" logically means a person other than the claimant (beneficiary) already known to the insurer. Absent written notice of a claim under the policy by one of the persons identified in the statute before making payment on its policy, the insurer is discharged of all liability on the policy for payment of its proceeds in accordance with the terms of the policy. This interpretation advances the clear purpose of the statutory language at issue, which is to protect an insurer that pays its policy proceeds in accordance with the terms of the policy absent the requisite notice of a claim by someone other than the beneficiary designated in the policy. In my view, the plain language of the statute mandates this conclusion.

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divorce does not determine the rights of the wife in and to a life insurance policy does the policy become payable to the estate or to a named beneficiary if the husband so designates. Thus, the mere fact that the decedent was divorced did not give Unum notice that Genaw's rights in and to the policy were extinguished. Indeed, it is not unusual for a court to order a husband to maintain a policy of insurance on his life for the benefit of his wife or children.

While not necessary to reaching this conclusion, I note that reading "other person" as encompassing the designated beneficiary in the policy, as plaintiff suggests, violates the rule that the Legislature is presumed not to have included superfluous statutory language. See, e.g., *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407; 605 NW2d 690 (1999) (citing "the rule against construing statutory provisions in a way that tends to render portions of the statute surplusage"). An insurer would always have received written notice of a claim before making payment, so if "other person" includes the designated beneficiary in the policy, the statute is redundant in requiring written notice of a claim and of the divorce by one of the persons named in the statute.[5]

I would reverse and remand for entry of an order granting summary disposition in favor of defendant Unum Life Insurance Company.

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[5] In essence, if plaintiff's construction were adopted, the statute would read as follows: "However, the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice . . . of the divorce." The statute clearly requires more than mere notice of the divorce.

LOCKRIDGE v OAKWOOD HOSPITAL

Docket Nos. 283522 and 284664. Submitted July 14, 2009, at Detroit. Decided August 20, 2009. Approved for publication October 8, 2009, at 9:00 a.m.

Scarlett Y. Lockridge, as the personal representative of the estate of her son, James W. Stone, brought a medical malpractice action in the Wayne Circuit Court against Oakwood Hospital, Oakwood-Annapolis Hospital, Donald R. Schipper, M.D., and Professional Emergency Care, P.C., related to Stone's death from an aortic dissection. The jury returned a verdict in plaintiff's favor, and defendants moved for a new trial or judgment notwithstanding the verdict (JNOV). The court, John H. Gillis, Jr., J., denied the motions and entered a judgment against defendants and an order awarding plaintiff costs, interest, and attorney fees. Defendants separately appealed the judgment and the order awarding costs and attorney fees, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The trial court properly rejected as a basis for JNOV defendants' argument that because of the unforeseeability of Stone's aortic dissection, Schipper as a matter of law owed no duty to diagnose it. When deciding whether a duty exists, the most important factor is a sufficient relationship between the plaintiff and the defendant. In light of the physician-patient relationship between Stone and Schipper, Schipper owed Stone the duty to conform to the standard of care. According to one of plaintiff's expert witnesses, the standard of care applicable to Schipper required him to order a chest x-ray, which he failed to do. That the aortic dissection was not foreseeable did not eliminate Schipper's duty.

2. Defendants additionally contended in their motion that JNOV was proper because plaintiff failed to establish a question of fact regarding proximate causation. Proximate cause normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for them. The plaintiff must show that it was foreseeable that the defendant's conduct might create a risk of harm to the victim and that

the result of that conduct and intervening causes were foreseeable. Defendants asserted that the diagnosis of aortic dissection was unforeseeable because the condition occurs extremely rarely in children. Moreover, plaintiff's expert witness testified that Schipper should have ruled out the diagnosis of pneumothorax, and defendants argue that it was not foreseeable that the failure to rule that diagnosis out would result in death from an aortic dissection. The expert also testified, however, that the standard of care mandated a chest x-ray to rule out pneumothorax, which would also have provided diagnostic information regarding the existence of the aortic dissection. Thus, it was foreseeable that Schipper's failure to order an x-ray to rule out the most likely diagnosis would also have resulted in the failure to diagnose an aortic dissection. Accepting defendants' argument would mean that if a physician considered one diagnosis and failed to rule it out, he or she would have no liability if the patient actually had a different and rare disease that would have been revealed by the same diagnostic test. Whether a plaintiff could prove proximate cause would depend entirely on the patient's most likely diagnosis. The legal issue is not whether the patient's actual ailment is foreseeable, but whether the patient's injuries and damages arising from the missed diagnosis qualify as a natural and probable result of the defendant's negligent conduct. A diagnostic process may yield unexpected results, but an unforeseen diagnosis does not relieve a physician from liability if the patient's actual condition would have been diagnosed naturally and probably had the physician complied with the standard of care.

3. Plaintiff's counsel elicited improper testimony regarding an authoritive treatise, in violation of MRE 707, but the error was harmless. The references to the treatise were brief and isolated, and given other properly admitted evidence that Schipper violated the applicable standard of care, defendants' substantial rights were not infringed.

4. The trial court did not abuse its discretion by denying defendants' motion in limine concerning what defendants claimed were theories of liability not found in plaintiff's complaint or by sustaining an objection to the closing argument of defendants' counsel concerning the absence of certain treatises as exhibits.

Affirmed.

NEGLIGENCE — MEDICAL MALPRACTICE — PHYSICIANS' LIABILITY — PROXIMATE CAUSE — FORESEEABILITY — DIAGNOSIS OF PATIENT'S CONDITION.

It is foreseeable that a physician's failure to order a test to rule out the most likely diagnosis would also result in a failure to diagnose

> a different, rare condition when the test would have supplied information pertinent to both diagnoses; an unforeseen diagnosis does not relieve a physician from liability if the patient's actual condition would have been diagnosed naturally and probably had the physician complied with the standard of care.

Charfoos & Christensen, P.C. (by *David R. Parker* and *David W. Christensen*), for plaintiff.

Siemion, Huckabay, Bodary, Padilla, Morganti & Bowerman, P.C. (by *Raymond W. Morganti*), for defendants.

Before: OWENS, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM. In these consolidated medical malpractice appeals, defendants, Oakwood Hospital, also known as Oakwood Healthcare, Inc., Oakwood-Annapolis Hospital, Donald R. Schipper, M.D., and Professional Emergency Care, P.C., appeal as of right two orders entered by the trial court: an October 2007 judgment for plaintiff, Scarlett Y. Lockridge, personal representative of the estate of decedent, James W. Stone (Docket No. 283522), and a March 2008 order awarding plaintiff attorney fees and costs (Docket No. 284664). We affirm.

I

This medical malpractice case arises from the death of Stone, plaintiff's 14-year-old son. On February 26, 2004, while walking to the school bus stop, Stone developed chest pain, had difficulty breathing, vomited, and fell to the ground. Plaintiff took him to the Oakwood-Annapolis emergency room, where Dr. Schipper examined the boy. Dr. Schipper concluded that Stone was suffering from anxiety and hyperventilation

and treated him with Valium and Toradol, an analgesic. Stone died in his sleep that evening, and an autopsy revealed an aortic dissection.[1] Plaintiff contended at trial that given Stone's chest pain and related symptoms, the standard of care required that Dr. Schipper order a chest x-ray. Plaintiff's expert witnesses opined that a chest x-ray probably would have revealed the presence of an aortic abnormality, which would have led to further testing, such as a computerized tomography (CT) scan. According to plaintiff's experts, either of those tests would have allowed definitive diagnosis of the aortic dissection, and lifesaving surgery would have followed. Dr. Schipper conceded at trial that an aortic dissection could present with acute chest pain, vomiting, difficulty breathing, and anxiety, but that he "never" considered this diagnosis because he had never heard of an aortic dissection in a pediatric patient.

At the close of proofs, defendants moved for a directed verdict, which the trial court denied. The jury returned a verdict in plaintiff's favor, awarding $150,000 for past damages (pain and suffering and loss of society and companionship) and $150,000 for future loss of society and companionship. Defendants filed motions for a new trial or judgment notwithstanding the verdict (JNOV), which the trial court denied. The trial court entered judgment against defendants in the amount of $300,000, plus taxed costs, interest, and attorney fees.

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[1] An aortic dissection occurs when the innermost lining of the aorta tears, allowing blood to leak into the wall of the aorta. The pressure of the leaking blood weakens the outermost aortic wall, which may eventually tear. The dissection in Stone's aorta led to a tear that permitted blood to leak into the pericardium, the sac surrounding his heart. The pressure of the blood compressed Stone's heart, prevented it from filling, and rapidly caused his death.

II

Defendants first contend that the trial court should have granted their motion for JNOV because, in light of the unforeseeability of Stone's aortic dissection, as a matter of law Dr. Schipper owed no duty to diagnose it. We review de novo a trial court's ruling on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A motion for . . . JNOV should be granted only if the evidence viewed in [the light most favorable to the nonmoving party] fails to establish a claim as a matter of law." *Id*.

> Whether a defendant owes any duty to a plaintiff to avoid negligent conduct is a question of law for the court to resolve. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). "In determining whether to impose a duty, this Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997), citing *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992). Thus, a duty arises out of the existence of a relationship "between the parties of such a character that social policy justifies" its imposition. Prosser & Keeton, Torts (5th ed), § 56, p 374. See also, *Buczkowski*, *supra*, 100-101. [*Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004)].

Although courts examine "the foreseeability and nature of the risk" when deciding whether a duty exists, the most important factor is "a sufficient relationship between the plaintiff and the defendant." *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993). Duty in a medical malpractice case arises from the physician-patient relationship. *Hill v Kokosky*, 186 Mich App 300, 302; 463 NW2d 265 (1990); see also *Dyer*, *supra* at 50 (observing that "the duty of care in a medical malpractice action has its basis in the relationship between the physician and the patient"). " 'Mal-

practice, in its ordinary sense, is the negligent performance by a physician or surgeon of the duties devolved and incumbent upon him on account of his contractual relations with his patient.' " *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 423; 684 NW2d 864 (2004), quoting *Delahunt v Finton*, 244 Mich 226, 230; 221 NW 168 (1928).

In light of the physician-patient relationship between Stone and Dr. Schipper, Dr. Schipper owed Stone a duty of reasonable care, which in a medical malpractice case constitutes the duty to conform to the standard of care. *Skeffington v Bradley*, 366 Mich 552, 556; 115 NW2d 303 (1962). One of plaintiff's expert witnesses testified that the standard of care applicable to Dr. Schipper required that he order a chest x-ray and that Dr. Schipper breached the standard of care by failing to do so. Regardless of whether a chest x-ray would have revealed a rare disorder like an aortic dissection, or a more commonplace malady, Dr. Schipper had a duty to conform his conduct to the standard of care. That Stone's aortic dissection was not foreseeable did not eliminate Dr. Schipper's duty to act in a manner consistent with the standard of care. Furthermore, even in a typical negligence case, a "plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that *some injury* to the plaintiff was foreseeable or to be anticipated." *Schultz*, *supra* at 452 n 7 (emphasis added). We conclude that the trial court properly rejected defendants' lack-of-duty argument as a basis for JNOV.

III

Defendants additionally maintain that the trial court erred by denying JNOV because plaintiff failed to

establish a question of fact regarding causation. Defendants insist that Dr. Schipper cannot face liability for neglecting to order a test for a condition, pneumothorax, that the patient did not have.

The plaintiff in a medical malpractice case must prove that the defendant's breach of the applicable standard of care proximately caused the plaintiff's injuries. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Proximate cause is a question for the jury to decide unless reasonable minds could not differ regarding the issue. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). Proximate cause incorporates two separate elements: (1) cause in fact and (2) legal or proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Defendants do not challenge the presence of cause in fact in this case, that but for Dr. Schipper's negligence in failing to order a chest x-ray, Stone's aortic dissection would have been diagnosed.

Legal or proximate cause normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for them. *Id.* at 163. "To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct 'may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable.' " *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997), quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

> "It appears that the modern trend of judicial opinion is in favor of eliminating foreseeable consequences as a test of proximate cause, except where an independent, responsible, intervening cause is involved. The view is that once it is determined that a defendant was negligent, he is to be held responsible for injurious consequences of his negligent act or omission which occur naturally and directly, without

> reference to whether he anticipated, or reasonably might have foreseen such consequences. . . . There is no need for discussing proximate cause in a case where the negligence of the defendant is not established, but when his negligence has been established, the proximate result and amount of recovery depend upon the evidence of direct sequences, and not upon the defendant's foresight." [*Davis v Thornton*, 384 Mich 138, 147; 180 NW2d 11 (1970), quoting 38 Am Jur, Negligence, §§ 58, pp 709-710.]

"The determination of remoteness . . . should seldom, if ever, be summarily determined." *Davis*, *supra* at 147.

Defendants insist that because aortic dissections occur with extreme rarity in children, the diagnosis was unforeseeable in this case. Dr. Michael Clark, defendants' emergency medicine expert, testified, in pertinent part:

> And I personally had never heard that you could have a dissecting aorta in this pediatric group.
>
> I went back and looked in all our emergency medicine literature. It's just not there. And as you know, I studied for my re-certification boards. It still wasn't there. There is nothing that mentioned dissection in a pediatric age group.

Dr. Brian Schurgin, plaintiff's expert, disagreed. Dr. Schurgin testified that he had heard of a case of aortic dissection in a patient who was less than 21 years old and that the condition was "well-known" in patients with Marfan's syndrome.[2] He continued, "[T]here is a defying [sic] subset of younger patients that this occurs in, specifically people with connective tissue disorder."

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[2] Marfan's syndrome is "a congenital disorder of connective tissue characterized by abnormal length of the extremities, especially of fingers and toes, . . . cardiovascular abnormalities (commonly dilatation of the ascending aorta), and other deformities." *Dorland's Illustrated Medical Dictionary* (25th ed), p 1523. None of the experts expressed that Stone probably had Marfan's syndrome, despite the fact that he was almost six feet tall at age 14.

Dr. Schurgin opined that regardless of whether a physician knows that a patient has a connective tissue disorder, "it's in your differential diagnosis of anybody who has acute onset of eight over ten chest pain and collapses and has all the symptoms, including this sense of impending doom that was clearly here."

Defendants' argument regarding causation does not address Dr. Schurgin's testimony that an aortic dissection was foreseeable in a patient such as Stone. Instead, defendants suggest that plaintiff failed to establish proximate causation because Dr. Schurgin predicated his standard-of-care opinions on Dr. Schipper's failure to rule out a spontaneous pneumothorax, a condition "unrelated" to an aortic dissection. Defendants reason that it was not foreseeable that the failure to rule out a spontaneous pneumothorax would result in death due to an aortic dissection.

This argument is factually and legally flawed. Factually, it mischaracterizes the testimony given by Dr. Schurgin and the other experts. Dr. Schurgin testified that the standard of care required that the differential diagnosis for a patient such as Stone include spontaneous pneumothorax, pulmonary embolism, heart attack, aortic dissection, or "some kind of congenital or birth anomaly . . . ." "Those would be the ones that would be worrisome that you would need to take action on in the emergency department." According to Dr. Schurgin, the standard of care mandated a chest x-ray to rule out a spontaneous pneumothorax. Given Stone's age, asthma history, and tall and thin body habitus, Dr. Schurgin opined that the most likely diagnosis for him was a spontaneous pneumothorax. But Dr. Schurgin explained that a chest x-ray performed to investigate this possibility would also have provided diagnostic information regarding the existence of an aortic dissection:

> And I had always been trained that greater than any [sic] percent of the time when you do a chest x-ray in someone with aortic dissection, you will see an abnormality, primarily along the knob of the aorta, which is that diagram that you had where the aorta was going from ascending to descending. That's called a [sic] "aortic knob."
>
> Typically, you'll see a widening there, often called a widening of the mediastinum, which is the central part of the chest.
>
> There are several other subtle findings that can be seen as well. But I've always been trained that greater than eighty (80%) percent of the time, a chest x-ray will show you an abnormality that would be consistent with aortic dissection.

In light of Dr. Schurgin's testimony, it was foreseeable that Dr. Schipper's failure to order an x-ray to rule out the most likely diagnosis, spontaneous pneumothorax, would also result in a failure to diagnose an aortic dissection because a chest x-ray would have supplied information pertinent to both diagnoses.

Furthermore, all the experts agreed that an aortic problem should have been in Dr. Schipper's differential diagnosis for Stone. In emergency medicine, physicians typically construct a list of possible explanations for a patient's symptoms, referred to as "differential diagnosis." Dr. Clark, defendants' expert, described this process as follows: " 'Differential diagnosis' mainly means given the complaint, coupled with physical examination, including the vital signs, what kind of thought process are you thinking about? What kind of disease entities or injury are you thinking of?" Dr. Clark admitted that a differential diagnosis can change as the examination proceeds and that for Stone the differential diagnosis included "[a]nything from trauma to pulmonary, cardiac, to GI [gastrointestinal], any infectious disease, any of those categories which would effect

[sic] the chest," and anxiety. Another defense expert, Dr. Bruce Janiak, described a differential diagnosis as "a list of potential causes that explain the patient's complaint." Dr. Janiak offered that the differential diagnosis for Stone included "[t]rauma; pulmonary embolism; pneumothorax; pneumonia; tumor; pleural fusion [sic: effusion]; emotional stress; esophageal disease; mediastinitis; gastric reflux; diseases of the great vessels, or the heart . . . ." The "great vessels" include the aorta.

Dr. Schurgin addressed defendants' claim that because aortic dissection is exceedingly rare in children, Dr. Schipper need not have ruled it out, explaining that "there's a systematic evaluation you need to do in every patient to make sure that you exclude rare causes." He offered the following example: "We do EKG's now on everyone over the age of 10 or 15 with chest pain. It's probably equally rare for a 15-year-old to have, or a 14-year-old to have a heart attack, but yet it's a routine test. Why? Because if it's missed, it's catastrophic." That defendants performed an EKG on Stone within minutes of his arrival supports Dr. Schurgin's opinion.

According to defendants' argument, if a physician considered one diagnosis and failed to rule it out, he or she would have no liability if the patient actually had a different and rare disease. In other words, whether a plaintiff proved proximate cause would entirely depend on the patient's most likely diagnosis. If the defendant negligently failed to investigate the patient's most probable condition and the patient actually had an alternative, rare problem, the physician would have no liability. Defendants' theory would signify, for example, that if a physician suspected that a patient had a stroke but failed to order a CT scan, he or she would have no liability if the patient actually had a rare brain tumor

that also would have been revealed by a CT scan. This reasoning is inconsistent with the diagnostic process, which inherently assumes that one test like a chest x-ray or CT scan may reveal information relevant to a variety of different diagnoses. Furthermore, the legal issue is not whether the patient's actual ailment is foreseeable, but whether the patient's injuries and damages arising from the missed diagnosis qualify as a "natural and probable result of" the defendant's negligent conduct. M Civ JI 15.01. The diagnostic process may yield unexpected results, as in this case. But an unforeseen diagnosis does not relieve a physician from liability if the patient's actual condition would have been diagnosed naturally and probably had the physician complied with the standard of care.

We conclude that the trial court properly denied defendants' motion for JNOV premised on their contention that no genuine issue of fact tended to establish that they proximately caused Stone's death.

IV

Defendants next complain that plaintiff's counsel repeatedly violated MRE 707 by reading material from an authoritative treatise to the jury. We review for an abuse of discretion a trial court's decision to admit evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "However, when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed de novo . . . ." *Barnett*, *supra* at 159.

Although we agree with defendants that plaintiff's counsel elicited improper authoritative treatise testi-

mony at trial in violation of MRE 707, we find the impropriety harmless. MRE 707 provides:

> To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.

As the transcript reflects, defense counsel made only one objection to Dr. Schurgin's testimony regarding the emergency medicine study text. Defense counsel objected to Dr. Schurgin's statement that he viewed the treatise as authoritative.[3] The trial court correctly over-

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[3] The transcript reflects as follows the only objection by defense counsel:

> *Q*. Let's first find out, are there texts that you say are authoritative with respect to this case?
>
> *A*. Yes.
>
> *Q*. And would you tell the jury what text and what portions—what do you rely on as authoritative sources in this case?
>
> *A*. Well, in this case, what I relied on was two versions of the book by Tintinelli, which [sic] called *A Comprehensive Study Guide in Emergency Medicine*.
>
> There is [sic] a Fifth and Sixth Edition that kind of bridge the dates in this case; the Fifth preceding this case, and the Sixth being published right round the time of this case.
>
> And once again, my knowledge of aortic dissection had been greater than eighty percent (80%) of the time you'd see something abnormal on a chest x-ray, that seemed to be challenged by the defense experts.
>
> I actually went to these textbooks—[a]nd in books like this, which are reference books—

ruled this groundless objection because MRE 707 expressly contemplates that a learned treatise may be "established as a reliable authority by the testimony or admission of *the witness or by other expert testimony* or by judicial notice . . . ." (Emphasis added.)

In light of defense counsel's failure to object during the balance of Dr. Schurgin's testimony regarding the emergency medicine text, we review for plain error affecting defendants' substantial rights their claim that plaintiff violated MRE 707. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001); MRE 103(a)(1) and (d). The transcript reveals that plaintiff's counsel did violate MRE 707 by introducing statements from the emergency medicine text through Dr. Schurgin as substantive evidence, specifically references to the text's statistics on the frequency of chest x-ray diagnosis of aortic dissection. However, the transcript does not substantiate defendants' contention that plaintiff's counsel "extensively" or "repeatedly" questioned Dr. Schurgin about the text's contents. Given the relatively brief and isolated nature of the error and the other properly admitted evidence that Dr. Schipper violated the applicable standard of care in this case,[4] we detect no infringement on defendants' substantial rights.

> [*Defense counsel*]: I'm going to object, Your Honor. He is now trying to self-authenticate a learned treatise as authoritative.
>
> That is inappropriate on direct examination. It's only appropriate for impeachment or cross-examination at Rule of Evidence 707.
>
> *The Court*: The objection is overruled. You can finish your answer.

[4] For example, plaintiff's other expert, Dr. Daniel Watson, testified without reliance on an authoritative treatise that the "the majority" of aortic dissections appear as an aortic abnormality on a chest x-ray.

V

Defendants next aver that the trial court erred by denying their pretrial motion in limine and permitting plaintiff to present to the jury three "new" theories of liability not found in her complaint: (1) the failure to include aortic dissection in the differential diagnosis, (2) obtaining an inadequate patient history and physical exam, and (3) the "failure to order a CT scan to rule out pneumothorax, pneumonia and pulmonary embolism." "Decisions concerning the meaning and scope of pleadings fall within the sound discretion of the trial court." *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). A trial court abuses its discretion only when its decision results in an outcome falling outside the range of principled outcomes. *Woodard*, *supra* at 557.

Plaintiff's complaint is not a model of detail. It alleges that Stone died of an aortic dissection and that Dr. Schipper violated the standard of care because he "failed to request diagnostic studies, including but not limited to, a chest X-ray . . . ." The complaint also alleges that Dr. Schipper should have obtained a surgical consultation and that "as a proximate [result] of the Defendants' failure to properly evaluate, diagnose and treat Plaintiff Decedent's condition, Plaintiff's Decedent was not appropriately treated for his cardiac condition, resulting in his death."

Dr. Schurgin testified at trial in a brief and limited fashion concerning Dr. Schipper's alleged failures to properly examine Stone or obtain a complete patient history. Although Dr. Schurgin did express that Dr. Schipper failed to obtain an adequate history and performed an incomplete physical examination, plaintiff focused throughout trial on Dr. Schipper's failure to order a chest x-ray. Plaintiff's counsel did not mention the allegedly inad-

equate patient history or physical examination in his closing argument. Rather, he argued that the

> whole theory here, the whole theory of Dr. Schurgin was, the most likely cause of the chest pain—the most likely cause based on presentation could have been a pneumothorax.
>
> And his thinking is, Let's look at it. Let's look at it; okay? And if you did that, that's what you'd find. You'd find a widening of the mediastinum; you'd find an aortic arch.

This case differs markedly from *Dacon*, *supra* at 334-335, in which the plaintiff sought to add an entirely new theory of liability during trial and essentially admitted the futility of proving the previously pleaded theories. Furthermore, defendants never asserted that they lacked an understanding of the nature of plaintiff's claims or an adequate opportunity to defend against them. Consequently, we find no abuse of discretion in the trial court's denial of defendants' motion in limine.

VI

Defendants further submit that the trial court improperly prevented their counsel from clarifying that the "purportedly reliable texts offered into evidence by . . . Plaintiff" did not amount to substantive evidence. We review for an abuse of discretion the trial court's decisions concerning "[w]hat constitutes a fair and proper" closing argument. See *Wilson v Gen Motors Corp*, 183 Mich App 21, 27-28; 454 NW2d 405 (1990).

In pertinent part, defense counsel told the jury the following:

> Dr. Schurgin talked about what would have shown up on a chest x-ray. And he said, Oh, in one book it's ninety percent; in another book it's eighty-eight percent.
>
> Did we see the study? Has the study been shown to you? The answer is no. If that study that Dr. Schurgin suppos-

> edly relies on was evidence, it would have one of these little stickers on it, ladies and gentlemen. And I can promise you—
>
> [*Plaintiff's counsel*]: Your Honor, again. [Defense counsel] knows that we cannot offer treatises in support of our case. They are limited for cross examination purposes and can never be admitted. And that's just wrong for him to say that. The rules of law won't allow me to do that.
>
> [*Defense counsel*]: And that's my whole point.
>
> *The Court*: Okay. The objection is sustained.

As defendants have correctly observed, the textbook statistics did not constitute admissible substantive evidence. Therefore, the trial court properly sustained plaintiff's objection. But notwithstanding the sustained objection, defendants' brief on appeal admits that their trial counsel successfully relayed to the jury that the statistics did not amount to substantive evidence. Furthermore, the trial court's ruling did not prevent defense counsel from discussing the statistics; the trial court only precluded argument that an adverse inference arose from the absence of the treatises as marked exhibits. Because the trial court did not err by precluding this improper argument, defendants are not entitled to relief on this ground. And even assuming that the trial court should have permitted defense counsel further comment regarding this issue, any potential error in limiting defense counsel's closing argument in no way compromised defendants' right to a fair trial or substantial justice. MCR 2.613(A).[5]

Affirmed.

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[5] Because we find no basis for disturbing the jury verdict, we need not address defendants' appellate argument in Docket No. 284664 that "[i]f this Court reverses the lower court judgment, the award of costs and case evaluation sanctions must also be reversed."

ELLOUT v DETROIT MEDICAL CENTER

Docket No. 286207. Submitted August 11, 2009, at Lansing. Decided October 8, 2009, at 9:05 a.m.

Sheila Ellout, as personal representative of the estate of Cynthia Latimore, deceased, brought a medical malpractice action in the Wayne Circuit Court against Detroit Medical Center, Detroit Receiving Hospital and University Health Center, and Christina L. Coulbeck, R.N. The defendants moved for summary disposition, alleging that the plaintiff's filing of the suit against Coulbeck before the expiration of the 154/182-day no-suit period provided in MCL 600.2912b required summary disposition in favor of the defendants. The court, Isidore B. Torres, J., denied the plaintiff's motion to voluntarily dismiss Coulbeck and concluded that the plaintiff's premature filing with regard to Coulbeck required that the action against Coulbeck be dismissed with prejudice. The court further held that such a dismissal constituted an adjudication on the merits with regard to the remaining defendants, which had been timely sued under a respondeat superior theory. The court therefore granted summary disposition in favor of the defendants. The plaintiff appealed.

The Court of Appeals *held*:

The trial court erred in granting the motion for summary disposition. The appropriate remedy for a plaintiff's failure to comply with MCL 600.2912b by prematurely filing suit is dismissal without prejudice. The trial court erred in dismissing the claim against Coulbeck with prejudice. Because the dismissal should have been without prejudice, it was not an adjudication on the merits. The order granting summary disposition must be reversed and the case must be remanded to the trial court for the entry of an order reinstating the plaintiff's complaint and an order dismissing the claim against Coulbeck without prejudice.

Reversed and remanded.

K. F. KELLY, J., dissenting, stated that the trial court's decision to dismiss the claim against Coulbeck with prejudice because the period of limitations had expired was within the range of reasonable and principled outcomes and was not an abuse of discretion. The decision was also consistent with MCR 2.504(B)(3), under

which the dismissal operated as an adjudication on the merits. The trial court did not abuse its discretion by declining to voluntarily dismiss Coulbeck, which would have deprived the other defendants of their entitlement to summary disposition. The trial court did not err by applying retroactively the holding in *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280 (2007), that MCR 2.504(B)(3) means that a dismissal based on the expiration of a period of limitations operates as an adjudication on the merits unless the court specifies otherwise. The trial court did not err by granting the defendants' motion for summary disposition or abuse its discretion by dismissing the plaintiff's case with prejudice.

NEGLIGENCE — MEDICAL MALPRACTICE — NOTICES OF INTENT TO FILE SUIT — PREMATURE FILING OF CLAIM.

The appropriate remedy for a plaintiff's failure to comply with the no-suit period provided in MCL 600.2912b by prematurely filing suit against a defendant is dismissal of the action against the defendant without prejudice; the dismissal without prejudice is not an adjudication on the merits.

Weiner & Associates, PLLC (by *Cyril V. Weiner, Joel A. Sanfield, and John C. Signorino, III*), for the plaintiff.

Plunkett Cooney (by *Robert G. Kamenec*) for the defendants.

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

SHAPIRO, J. In this medical malpractice case, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We reverse and remand for entry of an order reinstating plaintiff's complaint and dismissing plaintiff's claim against defendant Christina L. Coulbeck, R.N., without prejudice. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue is whether plaintiff's suit against all defendants is barred because the filing of her complaint

occurred before the end of the 154/182-day no-suit period of MCL 600.2912b with regard to Nurse Coulbeck, whose actions were the gravamen of the respondeat superior claim against the other defendants.[1] Plaintiff sent her notice of intent (NOI) naming defendant Coulbeck on July 28, 2006, and filed her complaint on December 27, 2006, waiting less than 154 days after sending the notice. She had, however, previously sent an NOI to the other defendants and the complaint was timely with regard to them. Plaintiff moved to voluntarily dismiss Coulbeck, which the trial court denied without explanation. The trial court then concluded that plaintiff's filing suit against Coulbeck before the expiration of the 154/182-day period required a dismissal with prejudice with regard to Coulbeck and that such a dismissal constituted an adjudication on the merits regarding the remaining defendants pursuant to *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280; 731 NW2d 29 (2007), resulting in a grant of the remaining defendants' motion for summary disposition.

This Court reviews de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Here, we conclude that the trial court erred by granting defendants' motion for

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[1] In relevant part, MCL 600.2912b provides:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
>
> * * *
>
> (8) If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period.

summary disposition. The law is abundantly clear that where a plaintiff has failed to comply with § 2912b by prematurely filing suit, the appropriate remedy is dismissal without prejudice. "[D]ismissal without prejudice was the appropriate remedy for plaintiff's noncompliance with § 2912b(1) . . . ." *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997). See also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 48; 594 NW2d 455 (1999) (holding that "dismissal without prejudice would be the appropriate sanction" where a plaintiff fails to provide an NOI).

The trial court recognized these cases, but relied on *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703; 620 NW2d 319 (2000). However, *Holmes* involved a failure to file an affidavit of merit under MCL 600.2912d. It did not involve the NOI provision under § 2912b at issue in this case. The trial court also relied on *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005). In *Burton*, the Michigan Supreme Court held that the plaintiff's premature filing of the complaint did not toll the statute of limitations. *Id.* at 756. It held that "dismissal is an appropriate remedy for noncompliance with the notice provisions of MCL 600.2912b and that when a case is dismissed, the plaintiff must still comply with the applicable statute of limitations." *Burton*, *supra* at 753. It did not state, however, that the dismissal must be with prejudice.

In any case, even if *Burton* were controlling, the Michigan Supreme Court recently held in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), that § 2912b contains no mandatory dismissal penalty. *Bush*, *supra* at 173. Indeed, it concluded that "it was not the intent of the Legislature to incorporate a mandatory dismissal penalty into § 2912b." *Bush*, *supra* at 174. The Court explained:

> The stated purpose of § 2912b was to provide a mechanism for "promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . . ." To hold that § 2912b in and of itself mandates dismissal with prejudice would complicate, prolong, and significantly increase the expense of litigation. Dismissal with prejudice would be inconsistent with these stated purposes. [*Bush*, *supra* at 174-175 (citation omitted).]

The Court further noted that the only penalty to a defendant who fails to comply is "very minor" and that "it would be inconsistent . . . to assume that the Legislature intended to impose on plaintiffs the harshest penalty possible: dismissal with prejudice." *Id.* at 175. Although *Bush* involved a question regarding a defective NOI rather than premature filing, the result is the same, because the NOI statute does not set forth an express penalty for premature filing.

Thus, we conclude that the trial court erred in dismissing Coulbeck with prejudice because the proper sanction for plaintiff's premature filing against Coulbeck was dismissal without prejudice.[2] Moreover, because Couldbeck's dismissal should have been without prejudice, it was not an adjudication on the merits.[3] *Yeo*

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[2] It makes no difference that the period of limitations had run against Nurse Coulbeck at the time the motion was brought. A defendant against whom the period of limitations has run is protected from further litigation even when the dismissal is without prejudice. If a plaintiff should subsequently file against that defendant, the defendant would be entitled to summary disposition. However, where the basis for dismissal is that the plaintiff has prematurely filed under § 2912b, the proper remedy is dismissal without prejudice, regardless of whether the period of limitations has run.

[3] Having found that the dismissal should have been without prejudice, *Al-Shimmari* is inapplicable, because it involves a dismissal with preju-

v State Farm Fire & Cas Ins Co, 242 Mich App 483, 484; 618 NW2d 916 (2000). Accordingly, the trial court erred in granting defendants' motion for summary disposition.

We reverse the trial court's grant of summary disposition to defendants, remand for entry of an order reinstating plaintiff's complaint, and order that the trial court enter an order dismissing plaintiff's claim against Coulbeck without prejudice. We do not retain jurisdiction.

M. J. KELLY, P.J., concurred.

K. F. KELLY, J. *(dissenting.)* I respectfully dissent. I would affirm the trial court's order granting defendants' motion for summary disposition.

At issue is whether plaintiff's entire suit is barred because she filed her complaint before the end of the 154/182-day no-suit period of MCL 600.2912b. The trial court granted summary disposition for defendants because the period of limitations had expired with regard to defendant Christina L. Coulbeck, R.N. See MCR 2.116(C)(7). It therefore dismissed the claim against Coulbeck with prejudice and also dismissed the claims against the remaining defendants because they had been sued on the basis of the theory of vicarious liability. The majority concludes that this was error, because the appropriate remedy was to dismiss plaintiff's case against Coulbeck without prejudice. I disagree because plaintiff's suit is barred by the statute of limitations. It is also my view, and my concern, that the majority simply substitutes its opinion for that of the trial court, rather than analyzing the issue under the appropriate standard of review on appeal. Therefore, I respectfully dissent.

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dice. Accordingly, we need not determine whether its holding is retroactive in contexts outside the late service of process issue, the setting that *Al-Shimmari* specifically addressed.

I

Because defendants "moved for summary disposition under [MCR 2.116(C)(7)], MCR 2.504(B)(3) applies." *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 295; 731 NW2d 29 (2007). MCR 2.504(B)(3) provides:

> Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.

It is clear that under this court rule, a trial court *may* in its discretion decide whether to dismiss a party with or without prejudice. As this Court recognized in *Rose v Rose*, 10 Mich App 233, 236; 157 NW2d 16 (1968):

> The reason for the rule is that if a plaintiff does not care enough to prosecute his action diligently, fairness requires that defendant be allowed to protect himself from the bother of filing answers to a multiplicity of complaints for the same claim, by relying upon the dismissal as ending the matter for all time. This affords plaintiff reasonable and ample opportunity to bring his action and sustain his claim, while demanding diligence on his part for the protection of the defendant.

And, this Court's review of whether a trial court's decision under this rule was proper is limited to determining whether the trial court abused its discretion. *Marquette v Village of Fowlerville*, 114 Mich App 92, 96; 318 NW2d 618 (1982). Such an abuse occurs only when a trial court's decision is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Here, the trial court dismissed Coulbeck with prejudice, relying on *Burton v Reed City Hosp Corp*,

471 Mich 745; 691 NW2d 424 (2005), and *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703; 620 NW2d 319 (2000), where dismissal with prejudice was appropriate when the period of limitations had expired before the suit was commenced. The trial court made no mention in its original opinion and order whether its determination was an adjudication on the merits. Pursuant to MCR 2.504(B)(3), its dismissal operated as an adjudication on the merits. Moreover, on plaintiff's motion for reconsideration, the trial court affirmed its original decision, definitively stating that its initial decision dismissing Coulbeck with prejudice was an adjudication on the merits. Given the foregoing, and the fact that plaintiff failed to diligently proceed against Coulbeck, I fail to see how the trial court's determination was an abuse of discretion; rather, its decision to dismiss Coulbeck with prejudice because the period of limitations had expired was squarely within the principled range of outcomes and was consistent with the court rule. *Al-Shimmari*, *supra* at 295.

Furthermore, the fact that the trial court reached this determination does not show, as plaintiff argues, that it failed to recognize that it had discretion to state in its order that Coulbeck's dismissal was not an adjudication on the merits consistent with MCR 2.504(B)(3). Nor does it indicate that the trial court erroneously believed that it was precluded from making such a statement. Rather, plaintiff's brief in support of her motion for reconsideration specifically directed the trial court to the relevant court rule. Thus, the trial court simply exercised its discretion to disallow plaintiff's attempt to further pursue her claims.

II

I also consider to be unavailing plaintiff's argument that the trial court erred by denying her motion to

voluntarily dismiss Coulbeck from the suit under MCR 2.504(A)(2).[1] The decision whether to grant or deny a voluntary dismissal is, again, within the trial court's discretion and we review its decision for an abuse of discretion. *McKelvie v Mount Clemens*, 193 Mich App 81, 86; 483 NW2d 442 (1992). A trial court should grant a party's motion for voluntary dismissal only if no prejudice will result to the defendant. *Makuck v McMullin*, 87 Mich App 82, 85; 273 NW2d 595 (1978).

Here, plaintiff sought to dismiss Coulbeck from the suit while defendants' motion for summary disposition was pending. Had the trial court voluntarily dismissed Coulbeck, it would have deprived all the other defendants of their entitlement to summary disposition before the trial court could decide the motion. A voluntary dismissal should not be granted to avoid an impending adverse decision. See *McLean v McElhaney*, 269 Mich App 196, 202-203; 711 NW2d 775 (2005) rev'd on other grounds 480 Mich 978 (2007); *Rosselott v Muskegon Co*, 123 Mich App 361, 375-376; 333 NW2d 282 (1983). Under these circumstances, I cannot conclude that the trial court abused its discretion by declining to voluntarily dismiss Coulbeck. The trial court's decision was certainly within the range of principled outcomes. *Maldonado*, *supra* at 388.

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[1] MCR 2.504(A)(2) provides, in relevant part:

> Except as provided in subrule (A)(1) [dismissal by stipulation], an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.
>
> * * *
>
> (b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice.

III

Finally, I disagree with the majority that *Al-Shimmari* is not applicable to the present matter. The trial court properly considered the case and retroactively applied it to plaintiff's lawsuit, contrary to plaintiff's contention. A question concerning the retroactive application of a court's decision presents a question of law that we review de novo. *Duggan* v *Clare Co Bd of Comm'rs*, 203 Mich App 573, 575; 513 NW2d 192 (1994).

Typically, the decisions of this Court and the Michigan Supreme Court are given retroactive effect, meaning that they are applied to all pending cases in which a challenge has been raised and preserved. *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004). The courts of this state, however, will depart from this general rule if rare exigent circumstances exist. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005). In those matters, a decision will be applied prospectively, but such application is only appropriate if the decision at issue overrules clear and uncontradicted caselaw. *Id*. at 587.

In *Al-Shimmari*, our Supreme Court held that MCR 2.504(B)(3) means that a dismissal based on the expiration of a period of limitations operates as an adjudication on the merits unless the court specifies otherwise. *Al-Shimmari*, *supra* at 295-296. According to plaintiff, *Al-Shimmari* overruled *Rogers v Colonial Fed S & L Ass'n*, 405 Mich 607; 275 NW2d 499 (1979) (opinion by WILLIAMS), which in plaintiff's view held that a dismissal based on expiration of the period of limitations was *not* an adjudication on the merits. According to plaintiff, when she filed her complaint in December 2006, *Rogers*, and unpublished opinions citing it, was the existing "clear and uncontradicted case-

law" on which she relied. However, the "sole issue" in *Rogers* was whether the plaintiff was barred, by res judicata or court rule, from bringing a second suit when her first suit had been voluntarily dismissed with prejudice. *Id*. at 613. The Court held that such a case would not be precluded. *Id*. *Rogers* did, however, state in a footnote, "An accelerated judgment based on the three-year statute of limitations is not an adjudication on the merits of a cause of action." *Id*. at 619 n 5, citing *Nordman v Earle Equip Co*, 352 Mich 342; 89 NW2d 594 (1958).

This footnote is not the holding of the *Rogers* Court, but is dicta that had the support of only three justices. Further, the case upon which this dicta relies for support, *Nordman*, was decided before the General Court Rules of 1963, which included the original version of MCR 2.504(B)(3), were even promulgated. Moreover, the *Al-Shimmari* Court found that the assertion in footnote 5 is contrary to the plain language of the court rule. *Al-Shimmari*, *supra* at 296-297. And, perhaps most significantly, our Supreme Court has already applied *Al-Shimmari* retroactively in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418-419; 733 NW2d 755 (2007). Thus, neither *Rogers* nor the unpublished Court of Appeals cases cited by plaintiff can be fairly described as clear and uncontradicted caselaw, so that *Al-Shimmari* should only be applied prospectively. Accordingly, I would conclude that the trial court did not err by applying *Al-Shimmari* retroactively to plaintiff's case.

The trial court did not err by granting defendants' motion for summary disposition and did not abuse its discretion by dismissing plaintiff's case with prejudice. Accordingly, I dissent.

FRIES v MAVRICK METAL STAMPING, INC

Docket No. 283193. Submitted May 14, 2009, at Petoskey. Decided October 13, 2009, at 9:00 a.m.

Kristi Fries brought an action in the Antrim Circuit Court against Mavrick Metal Stamping, Inc., and others, seeking damages for injuries sustained when her arms were caught in an automatic stamping press that she was operating during the course of her employment at Mavrick. The machine cycled unexpectedly when her clothing triggered the finger-controlled light sensors that actuate the press. Fries alleged that Mavrick knew that the press was dangerously defective and would cycle without warning and willfully and intentionally disregarded this known danger. Fries alleged that Mavrick was liable for damages under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1). The defendants sought summary disposition, alleging that the facts did not show the existence of an intentional tort. The court, Philip E. Rodgers, Jr., J., denied the motion, holding that Fries had presented sufficient evidence that Mavrick had actual knowledge of the continuously operative dangerous condition presented by the press. Mavrick appealed by leave granted.

The Court of Appeals *held*:

1. A jury could reasonably conclude from the evidence that Mavrick's supervisors knew that an injury would follow from the operation of the completely unguarded press that had a demonstrated history of inadvertent, unintended activation. The evidence showed a genuine issue of material fact regarding Mavrick's actual knowledge of the dangers posed by the unguarded controls.

2. The facts alleged by Fries and the evidence in the record would allow a reasonable jury to conclude that when an employee wearing loose clothing operated the press an injury was certain to occur. The evidence established that Mavrick made no effort to prevent a second clothing-initiated cycling event by installing available safety equipment after an earlier cycling event had been reported and failed to warn Fries, a new user of the press, that loose clothing would activate the press. The trial court properly determined that a jury question existed regarding whether the

danger presented by the operation of the press constituted a continuously operative dangerous condition from which the jury could conclude that Mavrick had knowledge that an injury was certain to occur. The circuit court properly determined that a reasonable jury could conclude that Mavrick knew that an injury was certain to occur and willfully disregarded this knowledge.

Affirmed.

WORKERS' COMPENSATION — INTENTIONAL TORT EXCEPTION — CONTINUOUSLY OPERATIVE DANGEROUS CONDITIONS.

An intentional tort is the only exception to the exclusive remedy provided by the Worker's Disability Compensation Act; an intentional tort exists only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury; an employer intended an injury if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge; an employer may be found to have had knowledge that an injury was certain to occur where the employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury yet refrains from informing the employee about the condition so that the employee is unable to take the steps to prevent injury (MCL 418.131[1]).

Gruel Mills Nims & Pylman LLP (by *J. Paul Janes*), for plaintiff.

Running Wise & Ford, PLC (by *Michael J. Corcoran* and *Michael I. Conlon*), for Mavrick Metal Stamping, Inc.

Before: WHITBECK, P.J., and DAVIS and GLEICHER, JJ.

GLEICHER, J. In this action seeking recovery for an intentional tort falling outside the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1), defendant Mavrick Metal Stamping, Inc., appeals by leave granted the circuit court's order denying its motion for summary disposition. We affirm.

I. FACTS AND PROCEEDINGS

Mavrick manufactures automotive parts, and employed plaintiff Kristi Fries in its production department. On November 5, 2003, Mavrick assigned Fries to operate an automatic stamping press referred to as the OBI-11. That day, Fries wore a t-shirt under a long-sleeved shirt and a hooded zip-up sweatshirt. At some point during her shift, Fries reached into the die area of the OBI-11 to remove some stamped parts. Her loose clothing triggered the OBI-11's finger-controlled light sensors, which actuated the machine. The press cycled before Fries could withdraw her hands, and traumatically amputated both of Fries's arms between the wrists and elbows.

Fries's amended complaint alleged that Mavrick knew that the OBI-11 "was dangerously defective and would actuate without warning due to unguarded controls that were positioned at an unsafe distance to the cycling press." The amended complaint further asserted that Mavrick's "willful and intentional disregard of the known danger" associated with the press subjected it to liability under the intentional tort exception to the WDCA's exclusive remedy provision.

At Fries's deposition, she summarized the operation of the OBI-11 as follows: "Take the part, take the part from the bin. You have two different bins. Take one from each bin. Set it into the press. Hit the buttons. The press will come down, back up, you take the parts out." Fries and other Mavrick employees recalled that to cycle the OBI-11, an operator would simultaneously touch two button control pads located on a waist-high pedestal approximately 10 inches from the press. The presence of two fingers on the pads interrupted a light sensor beam and activated the OBI-11's operation. Mike Kucka, a former Mavrick press operator, re-

counted that two years before Fries's accident, the OBI-11 unexpectedly cycled when his loose clothing interrupted the control buttons' light sensors. Kucka described that although his unzipped shirt had tripped the light sensors and activated the machine, he escaped injury because his hands had remained outside the die area. Kucka reported this event to Larry Hague, then supervisor of Mavrick's maintenance crew, who replied that he could do nothing because Mavrick did not own the press. Kucka recalled that he had also advised Jason Olds, Fries's supervisor, about the inadvertent press cycling. After his experience with the OBI-11's unexpected activation, Kucka always buttoned his clothing behind his back. Fries testified that she had not operated the OBI-11 before the date of her accident, and had not received any warning concerning the risk of wearing loose clothing while running the machine.

Russ Willoughby, Mavrick's maintenance manager, admitted that the OBI-11 had no safety "pull-backs" designed to move the operator's hands away from the point of operation when the press cycled. Willoughby averred that pull-back devices "are routinely used at Mavrick," but conceded that the OBI-11 was "the only light-activated, sensory-controlled machine at Mavrick that did not have pull-backs." Olds explained that in contrast with the OBI-11's finger-touch control buttons, all other OBI presses at Mavrick activated by depressing dual palm buttons located above the operator's head or below the die working area. When asked, "Was there any safety guarding to prevent the operator's hand from being in the point of operation" on the OBI-11, Olds responded, "No."

The record also revealed that the OBI-11 lacked safety guarding of the finger control buttons. Gerald Rennell, a safety engineering expert witness for Fries,

averred in an affidavit that the manufacturer of the OBI-11's "Opto-Touch" finger control buttons offered safety guards that the manufacturer described as "field covers . . . designed to prevent accidental activation by *loose clothing*" that potentially could block the sensing beams. (Emphasis in original.) Paul Mullens, Mavrick's owner, acknowledged awareness with respect to the availability of safety guards for the OBI-11. John Bodnar, who investigated Fries's accident for the Michigan Occupational Safety and Health Administration, testified as follows regarding the finger control guards mentioned by Rennell:

> *Q*. . . . So the company itself had in its possession OPTi sensors that had bridge guards in the maintenance office, but instead of putting them on this machine, they were in the maintenance office?
>
> *A*. According to my inspection, yes.

Bodnar also found that the pedestal housing the control buttons had not been set at a safe distance from the point of press operation, which allowed Fries to contact the point of operation with her hands at the same moment that her clothes interrupted the finger pad light sensors. Bodnar affirmed that this created "a condition where . . . a worker could simultaneously have hands at point of operation in direct proximity of the control[.]"

Mavrick sought summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that as a matter of law the WDCA's exclusive remedy provision barred Fries's action. In a bench opinion, the circuit court ruled that Fries's amended complaint "sufficiently plead[ed]" an intentional tort claim that "surviv[ed] the (C)(8) challenge." The circuit court also denied Mavrick's motion under MCR 2.116(C)(10), reasoning as follows:

Here, to show an intentional tort the employer has to have actual knowledge of a certain injury and willfully disregard it. Now actual knowledge can be inferred, but the inference of actual knowledge comes from allowing someone to continue to work in what has been recognized to be a continuously dangerous condition, with no effort at cure, with no warning and where injury may be certain to occur.

There are . . . some factual disputes in this case. The issues raised here today are whether as a matter of law those are sufficient factual disputes to allow this case to go to a jury. Assumed most favorably from the Plaintiff's point of view, we have a machine upon which she has never worked, to which she is assigned to work that day by a production supervisor named Jason Olds. Mr. Olds provides her with no meaningful training and most importantly for this motion, no warnings with respect to the particular safety deficiencies with regard to this press.

Viewed most favorably from the Plaintiff's point of view, Mr. Ols [sic] has been warned by the regular operator of the press, Mr. Kucha [sic], that this press will double cycle if the . . . light beam is broken by something like a loose shirt or a loose jacket. Given the nature of the shop, the temperatures of the shop, it seems that it's fairly common for workers to have a [sic] extra jacket or shirt on and often unbuttoned. So the nature of the trigger for this safety issue is certainly common in the workplace or could reasonably [sic] inferred by a jury to be common in the workplace.

The machine itself, the Court presumes for purposes of this motion, is capable of being operated in a safe manner. In fact, for purposes of this motion, it's acknowledged that the actual guards necessary to make its safety apparent are at the workplace in the maintenance area and for reasons that are lost to time and memory, have simply never been installed.

So we have a press that can be triggered inadvertently and unintentionally by breaking the light beam as one would lean into it with a loose shirt. And due to the nature of the machine and the time period in which it recycles,

> place the worker in a position where it would be impossible to remove their hands quickly enough. And it is this modality that created the double loss that Plaintiff has suffered.
>
> How is it then that this could be certain to occur if the only prior occasion where it happened there was no injury? Well fortunately, Mr. Kucha [sic] managed to trigger this at a time where his hands weren't sufficiently in the press that he was caught. But quite frankly, if Mr. Ols [sic] is management, which he is for purpose of this motion, and if he's been told of this problem, which he has been for purposes of the motion, then it is only a question of time for an uninformed and untrained worker will be needlessly and certainly injured by the failure to take reasonable protective measures that were always available to prevent the injury.
>
> What we do have is indeed a continuously operative dangerous condition, knowledge of which is inferred—actual knowledge of which is inferred to the employer who allows workers to operate it without warning and with making no effort to cure the defect with the certainty of injury to follow. And injury did in fact ultimately occur.
>
> If these factual issues are resolved in favor of the Plaintiff, then a jury . . . could reasonably infer actual knowledge and return an award to the Plaintiff.

II. ANALYSIS

Mavrick now challenges the circuit court's summary disposition ruling under MCR 2.116(C)(10). This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). We also review de novo the interpretation and application of statutes as questions of law. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party

is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App 621. When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West*, 469 Mich 183.

The intentional tort exception to the WDCA's exclusive remedy provision sets forth, in pertinent part:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. [MCL 418.131(1).]

An employer's intentional conduct "is the requisite standard triggering the exception to the [WDCA] exclusivity provision." *Gray v Morley (After Remand)*, 460 Mich 738, 742; 596 NW2d 922 (1999). "[W]hether the facts alleged by plaintiff are sufficient to constitute an intentional tort is a question of law . . . ." *Id*. at 743. In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173 (opinion by BOYLE, J.), 191 (opinion by RILEY, J., concurring in part and dissenting in part); 551 NW2d 132 (1996), our Supreme Court explained that the language of MCL 418.131(1) reflects "a legislative recognition of a limited class of cases in which liability is possible despite the absence of a classic intentional tort . . . ."

Mavrick first maintains that no evidence supports that it possessed knowledge that the OBI-11 had a defect or that Fries's injury was "certain to occur." According to Mavrick, because no one had ever sustained injury while operating the OBI-11, its supervisory employees lacked any knowledge that an injury would occur. Mavrick further avers that Kucka's report to Hague and Olds created only "a mere suspicion of knowledge," not "actual" knowledge. In *Travis*, the Supreme Court held that "[a] plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Travis*, 453 Mich 173-174 (opinion by BOYLE, J.). Viewed in the light most favorable to Fries, the record evidence substantiates that Kucka advised two Mavrick supervisors, Hague and Olds, that the OBI-11 cycled unexpectedly when his unzipped jacket interrupted the nearby light beam and actuated the press. Although Kucka escaped injury, Mullens acknowledged awareness that an injury would follow from unintended cycling of an unguarded press:

> *Q*. [T]hat's the purpose of a light curtain and a pull-back, is so that the operator's hands are not at the point of operation during a cycle?
>
> *A*. In general that is considered the purpose, as are guards to prevent you from getting in there, screening, all kinds of other ways to try and make sure that people aren't hurt.

The record also establishes that Olds possessed actual knowledge that unlike the other presses at Mavrick, the OBI-11 lacked any form of safety guarding. On the basis of this evidence, a jury could reasonably conclude that Olds and the other Mavrick supervisors knew that an

injury would follow from the operation of this completely unguarded press with a demonstrated history of inadvertent, unintended activation. Kucka's reports and the other evidence gives rise to a genuine issue of material fact with regard to Mavrick's actual knowledge of the dangers posed by the unguarded OBI-11 finger controls.

Mavrick next challenges the circuit court's ruling that an injury caused by unanticipated action of the OBI-11 was "certain to occur." The Supreme Court in *Travis* specifically approved one variety of circumstantial evidence as satisfying the "certainty" requirement contained in MCL 418.131(1), which it described as a "continually operative dangerous condition":

> When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur. [*Travis*, 453 Mich 178 (opinion by BOYLE, J.).]

A companion case of *Travis*, *Golec v Metal Exch Corp*, supplied the facts invoked by the Supreme Court when it determined that a "continually operative dangerous condition" may give rise to circumstantial evidence of intentional tort liability. *Travis*, 453 Mich 183-187, 189-191 (opinion by BOYLE, J.), 198-199 (opinion by LEVIN, J., concurring in part and dissenting in part). In *Golec*, the defendant employer required the plaintiff to use a front-end loader to load wet scrap containing aerosol containers into a furnace. The front-end loader lacked a protective shield. *Id*. at 157-158 (opinion by BOYLE, J.). The plaintiff alleged that the defendant knew that wet scrap and aerosolized cans presented an explosion hazard. *Id*. at 158. At one point during his shift, the

plaintiff sustained a small burn caused by a minor explosion of the scrap. *Id*. The plaintiff's shift leader notified his supervisor of the injury, and the supervisor instructed the plaintiff to return to work. *Id*. at 158-159. Subsequently, a huge explosion resulted in the plaintiff's suffering severe burns. *Id*. at 159.

The Supreme Court held that the facts alleged by the plaintiff in *Golec* gave rise to a material question of fact with respect to whether the defendant committed an intentional tort. *Travis*, 453 Mich 184-185 (opinion by BOYLE, J.), 198-199 (opinion by LEVIN, J., concurring in part and dissenting in part). Concerning the injury's certainty to occur, the Supreme Court explained that the absence of an earlier large explosion, or additional smaller explosions, did not eliminate the certainty that an injury would occur, reasoning as follows:

> Plaintiff does not contend that every load of scrap would have exploded, but that every load of scrap had the potential to explode because each load could have contained a closed aerosol can or water. If the facts as alleged by plaintiff are established at trial, then plaintiff has proved the existence of a continually operative dangerous condition. Accordingly, we conclude that a genuine issue of material fact is presented regarding whether the injury was certain to occur. [*Id*. at 186 (opinion by BOYLE, J.).]

The Supreme Court also determined that sufficient facts supported that the defendant employer willfully disregarded that an injury was certain to occur, citing the supervisor's instruction to return to work "in the face of a condition that had already led to one, albeit minor, explosion." *Id*. at 187.

In this case, the facts alleged by plaintiff and contained in the record comprise evidence from which a reasonable jury could conclude that when an employee wearing loose clothing operated the unguarded OBI-11,

an injury was certain to occur. As with the dangerous work environment described in *Golec*, every encounter here between a worker's loose clothing and the OBI-11's finger control buttons inherently embodied the potential for inadvertent, unexpected cycling of the machine. Abundant and unrefuted evidence established that Mavrick made no effort to prevent another clothing-initiated cycling event by installing available safety equipment, and failed to warn Fries, a new user of the OBI-11, that loose clothing would actuate the press. These facts are readily distinguishable from those presented in *Travis*, where a press double cycled "only intermittently," was adjusted to prevent double cycling, and cycled so slowly that "[a]ll prior operators were able to withdraw their hands in time." *Travis*, 453 Mich 182. A jury could reasonably conclude in this case that the OBI-11 would cycle whenever loose clothing interrupted the control buttons' light signal, and that the short distance between the buttons and the point of operation rendered it certain that a worker wearing a loose garment would suffer injury while reaching into the die area to retrieve a stamped part. Given this evidence, the circuit court properly determined that a jury question exists regarding whether the danger presented by operation of the OBI-11 constituted a continuously operative dangerous condition.

Mavrick further asserts that the record evidence fails to demonstrate that it "willfully disregarded" actual knowledge that an injury certainly would occur. According to Mavrick, "[a]t best" the evidence "only shows Defendant's knowledge of a defective condition in the OBI-11 Press that could foreseeably have resulted in injury at some point in time. The facts clearly do not rise to the level of a case in which the exclusive remedy provision should be avoided." In *Golec*, 453 Mich 186, the Supreme Court held that in light of the employer's

knowledge that an earlier explosion of scrap caused by dangerous conditions remained uncorrected at the time of the plaintiff's injury, the facts created a genuine issue of material fact concerning whether the employer had willfully disregarded that an injury certainly would occur. The Supreme Court explained that the testimony presented a question of fact with respect to whether the plaintiff's supervisor had ordered the plaintiff back to work "in the face of a condition that had already led to one, albeit minor, explosion." *Id*. at 187.

We agree with the circuit court's determination that a reasonable jury could conclude that Mavrick knew an injury was certain to occur through use of the OBI-11 press and willfully disregarded this knowledge. As with the dangerous work environment described in *Golec*, here every encounter between a loosely clothed press operator and the OBI-11 inherently embodied the potential for serious injury, particularly in light of Mavrick's failure to guard the control buttons or incorporate pull-backs in the machine's operation. Given the information supplied by Kucka and the fact that he regularly operated the OBI-11 wearing clothes buttoned behind his back, and the other evidence of record that Mavrick failed to install field covers for the OBI-11's finger control buttons, which it instead stored in the maintenance office, we conclude that plaintiff introduced sufficient evidence establishing that a serious injury was inevitable when an unwarned worker used the press and that Mavrick willfully disregarded and ignored its actual knowledge of the inevitability of injury.

Affirmed.

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2. The Due Process Clause forbids a state from applying its own substantive or criminal law to a transaction, occurrence, or crime in which the state has insufficient interests or with which the state has insufficient contacts; a state may constitutionally apply its own law if the state has a significant contact or significant aggregation of contacts, creating state interests, so that application of its law is neither arbitrary nor fundamentally unfair. *People v Gayheart*, 285 Mich App 202.

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3. Statements by a sexual abuse victim to a sexual assault nurse examiner are testimonial and barred by the Confrontation Clause if the totality of the circumstances objectively indicate that the statements will be used in a later criminal prosecution or that the primary purpose of the sexual assault nurse examiner's questioning was to establish past events potentially relevant to a later criminal prosecution rather than to meet an ongoing emergency (US Const, Am VI). *People v Spangler*, 285 Mich App 136.

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2. A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words; the term "murder" has been settled in the law and in common parlance for centuries; a reasonable person does not have to guess at the meaning of the word "murder" or what conduct is likely to expose the person to criminal liability therefor; the failure of the first-degree murder statute to define the word "murder" does not render the statute unconstitutionally vague (MCL 750.316). *People v Mesik (On Recon)*, 285 Mich App 535.

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sonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Payne*, 285 Mich App 181.

5. Counsel's decisions on whether to retain witnesses, including expert witnesses, and on whether to waive an opening statement are presumed to be matters of trial strategy, and a defendant must meet a heavy burden to overcome the presumption when claiming ineffective assistance of counsel. *People v Payne*, 285 Mich App 181.

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10. A defendant may be shackled during trial only if the record evidence indicates that it is necessary to prevent escape or injury to persons in the courtroom, or to maintain order; a trial court's decision to shackle a defendant is reviewed on appeal for abuse of discretion; even if the trial court abuses its discretion, the defendant is not entitled to relief unless the defendant shows that he or she suffered prejudice. *People v Payne*, 285 Mich App 181.

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2. The provision of the Charter Township Act stating that a majority of the qualified and registered electors voting on an annexation question in the city or village to which the portion of the township is to be annexed and the portion of the township that is to be annexed must approve the proposed annexation does not impose an unlawful residency requirement to vote on the annexation question (MCL 42.34[5]). *Meridian Charter Twp v Ingham County Clerk*, 285 Mich App 581.
3. The specific provisions of the Charter Township Act concerning the certification procedures pertaining to

annexations by petition and referendum control over the certification procedures for ballot proposals in general contained in the Michigan Election Law when there is a conflict between the two provisions (MCL 42.34[6], 168.646a). *Meridian Charter Twp v Ingham County Clerk*, 285 Mich App 581.

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4. The terms "district" and "territory" in the phrase "district or territory affected" in Const 1963, art 2, § 6 have distinct meanings and are not interchangeable. *Meridian Charter Twp v Ingham County Clerk*, 285 Mich App 581.

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2. The statutory provision that absolves an insurance company from liability for payment of proceeds from a life insurance policy to the designated beneficiary unless it receives written notice of a claim under the policy and of a divorce does not require that the notice be given by

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DISTRICT COURTS

1. An assignee of a small claims judgment is statutorily barred from prosecuting a claim in the small claims division of district court at all stages of small claims proceedings, including postjudgment collection proceedings (MCL 600.8407[1]). *The Cadle Co v City of Kentwood*, 285 Mich App 240.

JUDICIAL REVIEW OF PERMITS TO INSTALL SOURCES OF AIR EMISSIONS—*See*

ENVIRONMENT 1

JURISDICTION—*See*

CONSTITUTIONAL LAW 2

RELIGIOUS CORPORATIONS AND ASSOCIATIONS 2

JURISDICTION OF COURT—*See*

CONTEMPT 1

LAW—*See*

CRIMINAL LAW 6

LIFE INSURANCE—*See*

INSURANCE 2

LIMBS—*See*

DAMAGES 1

LIMITATION OF ACTIONS

ARCHITECTS

1. An "improvement to real property"—for purposes of the statute pertaining to actions against architects, professional engineers, or contractors arising from an improvement to real property—is a permanent addition to or betterment of real property that enhances its value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs; factors to consider in distinguishing between ordinary repairs and an improvement are whether a modification adds to the value of the property for the purposes of its intended use, the nature of the improvement, and its permanence (MCL 600.5839[1]). *Miller-Davis Co v Ahrens Construction, Inc*, 285 Mich App 289.
2. A component of an improvement to real property that is an integral part of the improvement to which it belongs constitutes an improvement to real property for purposes of the statute pertaining to actions against architects, professional engineers, or contractors arising from an improvement to real property (MCL 600.5839[1]). *Miller-Davis Co v Ahrens Construction, Inc*, 285 Mich App 289.
3. The term "injury"—as used in the phrase "any injury to property" in the statute pertaining to actions against architects, professional engineers, and contractors arising from improvements to real property—is sufficiently broad to encompass a claim of defective workmanship in making an improvement to real property (MCL 600.5839[1]). *Miller-Davis Co v Ahrens Construction, Inc*, 285 Mich App 289.

MEDICAL MALPRACTICE

4. The wrongful death saving period is not tolled when an affidavit of merit is successfully challenged as being invalid; if an affidavit of merit is successfully challenged and there is no remaining time under the wrongful death saving period, the medical malpractice action

must be dismissed with prejudice (MCL 600.2912d, 600.5852). *Ligons v Crittenton Hospital*, 285 Mich App 337.

LIMITED LIABILITY COMPANIES—*See*

TAXATION 2

MEDICAL MALPRACTICE—*See*

ACTIONS 1

DAMAGES 1, 2

LIMITATION OF ACTIONS 4

NEGLIGENCE 1, 2, 3, 4, 5

MINORS IN POSSESSION OF ALCOHOL—*See*

CONSTITUTIONAL LAW 4

MOTIONS AND ORDERS

SHOW CAUSE MOTIONS

1. *Porter v Porter*, 285 Mich App 450.

SUMMARY DISPOSITION

2. Once a party makes a properly supported motion for summary disposition under MCR 2.116(C)(10), the opposing party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in the court rules, set forth specific facts showing that there is a genuine issue of material fact for trial; the trial court does not have a duty to independently consider all the evidence in the record before granting the motion; the burden of identifying the issues and the evidentiary support is on the parties, not the trial court (MCR 2.116[G][3], [4], and [5]). *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362.
3. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466.

MUNICIPAL CORPORATIONS

See, *also*, STATUTES 1, 2

BOUNDARIES

1. The fixing of municipal boundaries is a legislative function; the Legislature may change such boundaries at will,

with or without the consent of the electorate. *Meridian Charter Twp v Ingham County Clerk*, 285 Mich App 581.

MUNICIPALLY OWNED UTILITIES—*See*

PUBLIC UTILITIES 3

MURDER—*See*

CRIMINAL LAW 2

NEGLIGENCE

MEDICAL MALPRACTICE

1. *Ykimoff v W A Foote Memorial Hospital*, 285 Mich App 80.
2. A notice of intent to file a medical malpractice action need not be in any format but must identify, in a readily ascertainable manner, the specific information mandated by statute (MCL 600.2912b). *Ligons v Crittenton Hospital*, 285 Mich App 337.
3. An affidavit of merit in support of a medical malpractice action requires no less specificity than a notice of intent to file a medical malpractice action (MCL 600.2912d). *Ligons v Crittenton Hospital*, 285 Mich App 337.
4. It is foreseeable that a physician's failure to order a test to rule out the most likely diagnosis would also result in a failure to diagnose a different, rare condition when the test would have supplied information pertinent to both diagnoses; an unforeseen diagnosis does not relieve a physician from liability if the patient's actual condition would have been diagnosed naturally and probably had the physician complied with the standard of care. *Lockridge v Oakwood Hospital*, 285 Mich App 678.
5. The appropriate remedy for a plaintiff's failure to comply with the no-suit period provided in MCL 600.2912b by prematurely filing suit against a defendant is dismissal of the action against the defendant without prejudice; the dismissal without prejudice is not an adjudication on the merits. *Ellout v Detroit Medical Center*, 285 Mich App 695.

PREMISES LIABILITY

6. A premises possessor is generally not required to warn an invitee of open and obvious dangers; black ice, in the absence of some other, visible indicia of the otherwise

invisible hazard that it presents, is not by itself an open and obvious danger. *Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396.

NO-FAULT—*See*

INSURANCE 3

NONECONOMIC DAMAGES CAP IN MEDICAL MALPRACTICE—*See*

DAMAGES 1, 2

NEGLIGENCE 1

NOTICE—*See*

INSURANCE 2

NOTICES OF INTENT TO FILE SUIT—*See*

NEGLIGENCE 2, 5

OPEN AND OBVIOUS DANGERS—*See*

NEGLIGENCE 6

ORDINANCES—*See*

STATUTES 1, 2

ORGANIZATIONAL STRUCTURE—*See*

RELIGIOUS CORPORATIONS AND ASSOCIATIONS 1

PARENT AND CHILD

CONFINEMENT AND PREGNANCY EXPENSES

1. An order for the repayment of a mother's confinement and pregnancy expenses must provide that if the father marries the mother after the birth of the child and provides documentation of this fact, the unpaid confinement and pregnancy expenses are abated; orders for the repayment of such expenses entered before the effective date of an act providing for such abatement are subject to abatement in the same manner as those entered after that date; therefore, a father who marries the mother of his child before the effective date of the act and provides documentation of that fact is entitled to have his obligation for the payment of any unpaid expenses abated (MCL 722.712[4] and [5]). *Booker v Shannon*, 285 Mich App 573.

TERMINATION OF PARENTAL RIGHTS

2. A court may terminate parental rights only after finding a statutory ground for termination and finding that the termination of parental rights is in the child's best interests (MCL 712A.19b[5], as amended by 2008 PA 199). *In re Hansen*, 285 Mich App 158.
3. A court may consider foster home placement when deciding whether the termination of parental rights to the child is in the child's best interest (MCL 712A.19b[5]). *In re Foster*, 285 Mich App 630.

PERMITS TO INSTALL MAJOR SOURCES OF AIR EMISSIONS—*See*

ENVIRONMENT 1

PHYSICIANS' LIABILITY—*See*

NEGLIGENCE 4

POLICE LABORATORY REPORTS—*See*

EVIDENCE 2

PREEMPTION—*See*

STATUTES 1, 2

PRELIMINARY BREATH TESTS—*See*

CONSTITUTIONAL LAW 4

SEARCHES AND SEIZURES 3

PREMATURE FILING OF CLAIM—*See*

NEGLIGENCE 5

PREMISES LIABILITY—*See*

NEGLIGENCE 5

PRIOR STATEMENTS OF WITNESSES—*See*

EVIDENCE 1

PROBABLE CAUSE TO OBTAIN A WARRANT—*See*

SEARCHES AND SEIZURES 1

PROFESSIONAL ENGINEERS—*See*

LIMITATION OF ACTIONS 1, 2, 3

PROXIMATE CAUSE—*See*

NEGLIGENCE 1, 4

PUBLIC RECORDS—*See*

EVIDENCE 2

PUBLIC UTILITIES

ELECTRIC SERVICE

1. An administrative rule prohibiting an existing electric customer from transferring from one utility to another applies only to transfers from one utility regulated by the Public Service Commission to another similarly regulated utility (Mich Admin Code, R 460.3102[l], R 460.3411[2]). *Great Wolf Lodge of Traverse City, LLC v Public Service Comm*, 285 Mich App 26.
2. An administrative rule provides that the first electric utility serving a customer (which the rule defines as the buildings and facilities served, not the individual, association, partnership, or corporation served) is entitled to serve the entire load on the premises of the customer, even if another utility is closer to a portion of the customer's load; where service to buildings or facilities is interrupted, or buildings are demolished or facilities removed, in direct connection with a change of ownership or land use, neither the service interruption nor the replacement of old buildings and facilities with new ones creates a new customer; however, some service interruption or elimination may end the utility-costumer relationship; if, for example, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions are deemed to have extinguished the previously existing customer on the site, thus severing the utility-customer relationship (Mich Admin Code, R 460.5411[1][a],[11]). *Great Wolf Lodge of Traverse City, LLC v Public Service Comm*, 285 Mich App 26.
3. A municipally owned electric utility is statutorily barred from delivering electricity to customers outside its corporate limits already receiving the service from another

utility unless the serving utility consents in writing; for purposes of the statute, "customer" means the buildings or facilities served (MCL 124.3[2], 460.10y[2]). *Great Wolf Lodge of Traverse City, LLC v Public Service Comm*, 285 Mich App 26.

REFUSAL TO ADMIT GUILT—*See*

SENTENCES 1

RELIGIOUS CORPORATIONS AND ASSOCIATIONS

CHURCH PROPERTY

1. A denomination is considered hierarchical when it has a central governing body that has regularly acted within its powers and congregational when the governing powers and property ownership remain in the individual churches. *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602.

JURISDICTION

2. A determination that a religious organization is organized in a hierarchical structure does not divest trial courts of jurisdiction; rather, under the ecclesiastical abstention doctrine, it requires civil courts to resolve issues related to the religious polity in a manner that is consistent with determinations made by the highest body of the religious organization when entering a judgment. *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602.

REPAYMENT BY FATHER OF PREGNANCY EXPENSES—*See*

PARENT AND CHILD 1

REPORTS OF PATIENT'S CONDITION—*See*

NEGLIGENCE 1

RESIDENCY REQUIREMENTS—*See*

ELECTIONS 2

RESTRAINTS ON DEFENDANTS—*See*

CRIMINAL LAW 10

RIGHT OF CONFRONTATION—*See*

CONSTITUTIONAL LAW 3

RIGHT TO JURY TRIAL—*See*

CRIMINAL LAW 1

RIGHT TO VOTE—*See*

ELECTIONS 1

S CORPORATIONS—*See*

TAXATION 1

SEARCHES AND SEIZURES

See, also, CONSTITUTIONAL LAW 4

CONSTITUTIONAL LAW

1. The inevitable discovery doctrine does not apply when the police obtained no search warrant and no other warrant exception could have applied but probable cause existed for a warrant. *People v Hyde*, 285 Mich App 428.

FOURTH AMENDMENT

2. The exigent circumstances exception to the search warrant requirement provides that a police officer may search without a warrant in cases of actual emergency if there are specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officer or others, or (3) prevent the escape of a suspect; the existence of exigent circumstances must be considered on a case-by-case basis. *People v Chowdhury*, 285 Mich App 509.

PRELIMINARY BREATH TESTS

3. A preliminary chemical breath analysis for bodily alcohol content is a search within the meaning of the Fourth Amendment. *People v Chowdhury*, 285 Mich App 509.

SENTENCE CREDIT—*See*

SENTENCES 2

SENTENCES

REFUSAL TO ADMIT GUILT

1. A sentencing court cannot base a sentence, even in part, on a defendant's refusal to admit guilt; when determining if a sentencing court improperly considered a defendant's refusal to admit guilt, the reviewing court should examine the following factors: the defendant's maintenance of innocence after conviction, the sentencing

court's attempt to get the defendant to admit guilt, and the appearance that, had the defendant affirmatively admitted guilt, the sentence would not have been so severe. *People v Payne*, 285 Mich App 181.

SENTENCE CREDIT

2. *People v Patton*, 285 Mich App 229.

SERIOUS IMPAIRMENT OF BODY FUNCTION—*See*

INSURANCE 3

SETTLEMENTS—*See*

INSURANCE 1

SEXUAL ABUSE VICTIMS—*See*

CONSTITUTIONAL LAW 3

SEXUAL ASSAULT NURSE EXAMINERS—*See*

CONSTITUTIONAL LAW 3

SHOW CAUSE MOTIONS—*See*

MOTIONS AND ORDERS 1

SINGLE BUSINESS TAX—*See*

TAXATION 1, 2, 3

SMALL CLAIMS DIVISION—*See*

JUDGMENTS 1

SPEEDY TRIAL—*See*

CRIMINAL LAW 7

STATEMENTS OF IDENTIFICATION—*See*

EVIDENCE 1

STATEMENTS OF MEMORY OR BELIEF—*See*

EVIDENCE 1

STATUTES

MUNICIPAL CORPORATIONS

1. A state statute preempts regulation by a municipal corporation when the local regulation directly conflicts with the statute or the statute completely occupies the regulatory field; a direct conflict exists when the local

regulation permits what the statute prohibits or prohibits what the statute permits; a local regulation that regulates in an area where a state statute also regulates, with mere differences in details, is not rendered invalid due to conflict because, generally, regulation additional to that of a state law does not constitute a conflict with the state law. *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262.

2. The mere fact that the state, in the exercise of the police power, has imposed certain regulations does not prohibit a municipality from exacting additional requirements as long as there is no conflict between the two and the state statute does not provide that only its regulations apply; unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail. *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262.

STATUTES OF LIMITATIONS—*See*

HOMICIDE 1

STATUTORY GROUNDS FOR TERMINATION—*See*

PARENT AND CHILD 2

STRUCTURAL ERRORS—*See*

CRIMINAL LAW 1

SUITS TO RECOVER UNCLAIMED PROPERTY—*See*

ACTIONS 3

SUMMARY DISPOSITION—*See*

MOTIONS AND ORDERS 2, 3

TAX BASE UNDER THE SINGLE BUSINESS TAX—*See*

TAXATION 3

TAXATION

SINGLE BUSINESS TAX

1. All corporations, including subchapter S corporations, must determine their business incomes for purposes of the Single Business Tax Act by looking to their "federal taxable income" and are not entitled to exclude "casual

transactions" from their tax bases (MCL 208.3[3], 208.4[1]). *TMW Enterprises, Inc v Department of Treasury*, 285 Mich App 167.

2. *Alliance Obstetrics & Gynecology, PLC v Department of Treasury*, 285 Mich App 284.
3. *PNC National Bank Ass'n v Department of Treasury*, 285 Mich App 504.

USER FEES

4. There are three primary criteria to be considered when distinguishing between a user fee and a tax although there is no bright-line distinction between a valid user fee and a tax: first, a user fee must serve a regulatory purpose rather than a revenue-raising purpose, although a user fee may also be used to raise money as long as it is in support of the underlying regulatory purpose; second, a user fee must be proportionate to the necessary costs of the service rendered or the benefit conferred; and, third, the fee must be voluntary in nature, meaning that the payer of the fee must be able to refuse or limit its use of the service or benefit; the three criteria must be considered in their totality rather than in isolation. *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262.

TERMINATION OF PARENTAL RIGHTS—*See*

ADOPTION 1

PARENT AND CHILD 2, 3

TERRITORIAL JURISDICTION—*See*

CRIMINAL LAW 8, 9

TERRITORY—*See*

ELECTIONS 4

TESTIMONIAL HEARSAY—*See*

EVIDENCE 3

TRANSFERS FROM ONE UTILITY TO ANOTHER—*See*

PUBLIC UTILITIES 1

TRIAL—*See*

CONSTITUTIONAL LAW 1

CRIMINAL LAW 10, 11

TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY—*See*
CONSTITUTIONAL LAW 1

UNDERLYING FELONIES—*See*
HOMICIDE 1

UNIFORM UNCLAIMED PROPERTY ACT—*See*
ACTIONS 3

UNINSURED MOTORIST BENEFITS—*See*
INSURANCE 1

USER FEES—*See*
TAXATION 4

VICARIOUS LIABILITY—*See*
ACTIONS 2

WAIVERS OF OPENING STATEMENT—*See*
CRIMINAL LAW 5

WARRANT REQUIREMENT—*See*
SEARCHES AND SEIZURES 2

WINDING UP—*See*
CORPORATIONS 1, 3

WITNESSES—*See*
CONSTITUTIONAL LAW 1

WORDS AND PHRASES—*See*
CRIMINAL LAW 2
DAMAGES 1
ELECTIONS 4
LIMITATION OF ACTIONS 1, 3

WORKERS' COMPENSATION
INTENTIONAL TORT EXCEPTION
1. An intentional tort is the only exception to the exclusive remedy provided by the Worker's Disability Compensation Act; an intentional tort exists only when an employee is injured as a result of a deliberate act of the

employer and the employer specifically intended an injury; an employer intended an injury if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge; an employer may be found to have had knowledge that an injury was certain to occur where the employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury yet refrains from informing the employee about the condition so that the employee is unable to take the steps to prevent injury (MCL 418.131[1]). *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706.

WRONGFUL DEATH SAVING PROVISION—*See*

LIMITATION OF ACTIONS 4